86-612

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

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PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN,

Appellants,

v.

MILDRED FLANIGAN,

Appellee.

—o—

On Appeal From the Supreme Court of Montana

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JURISDICTIONAL STATEMENT

—o—

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QUESTIONS PRESENTED

1. Whether the award of $1,300,000 in punitive damages against appellants is violative of the Due Process Clause of the Fourteenth Amendment because it was made on the basis of Montana's impermissibly vague Punitive Damages Statute, which as applied in this case did not provide adequate standards for the imposition of punitive damages and which was interpreted to give rise, without notice, to a retrospective imposition of liability for torts not in existence at the time of appellants' conduct.

2. Whether the award of $1,300,000 in punitive damages against appellants is violative of the Eighth Amendment of the Constitution of the United States, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution, because it is vastly disproportionate to actual damages, and equally disproportionate to any penalties prescribed by the Montana legislature for illicit business conduct.

3. Whether the imposition of punitive damages upon appellants for conduct occurring in 1980 in connection with the appellants' termination of appellee's employment contract violates the Contract Clause, Art. I, § 10, cl. 1 of the Constitution of the United States, because it retroactively imposes a new, unanticipated and severe obligation on the contract between appellants and appellee, an obligation in the form of causes of action that were not created by the Montana Supreme Court until 1983 and 1984.

PARTIES TO THE PROCEEDINGS BELOW

Parties before the Supreme Court of Montana: Prudential Federal Savings and Loan Association and Fred Ogolin, appellants herein; Mildred Flanigan, appellee herein. Prudential Federal Savings and Loan Association is a wholly-owned subsidiary of Prudential Financial Services Corporation. Prudential Federal Savings and Loan Association has two subsidiaries, Prudential Capital Group and Prudential Development Company, and its only affiliates are wholly-owned subsidiaries of Prudential Financial Services Corporation. There are no other related companies whose disclosure is required by Supreme Court Rule 28.1.

The provisions of 28 U.S.C. § 2403(b) may be applicable to this appeal and a copy of this Jurisdictional Statement has been served on the Montana Attorney General. See Supreme Court Rule 28.4(c).

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In The

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October Term, 1986

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN,

Appellants,

v.

MILDRED FLANIGAN,

Appellee.

On Appeal From the Supreme Court of Montana

JURISDICTIONAL STATEMENT

Prudential Federal Savings & Loan Association (hereinafter "Prudential Federal") and Fred Ogolin (unless otherwise clear from the context, Prudential Federal and Fred Ogolin will be referred to jointly as "Prudential Federal") appeal from the final decision of the Supreme Court of Montana dated June 5, 1986, affirming the judgment of $1,494,170 entered against them by the District Court of the Second Judicial District, and the order of

the Supreme Court of Montana dated July 11, 1986, denying their petition for rehearing. Under this decision and order, appellants' rights under the Due Process Clause of the Fourteenth Amendment, the Excessive Fines Clause of the Eighth Amendment, as made applicable to the states by the Due Process Clause of the Fourteenth Amendment, and the Contract Clause have been denied.

OPINIONS BELOW

The opinion of the Supreme Court of Montana of June 5, 1986, which appears in the appendix hereto, p. 1, *infra,* is reported at 720 P.2d 257 (1986). The order of the Supreme Court of Montana of July 11, 1986, which appears in the appendix hereto, p. 24, *infra,* is unreported. The District Court did not issue an opinion. Its judgment appears in the appendix hereto, p. 26, *infra.*

JURISDICTION

The judgment of the Supreme Court of Montana, affirming the district court's imposition of punitive damages under Montana Code Ann. § 27-1-221, was entered on June 5, 1986. Appellants' motion for rehearing was denied on July 11, 1986.

A notice of appeal to this Court was timely filed in the Supreme Court of Montana on August 11, 1986.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTE

1. The Contract Clause, Art. I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law. . . ."

3. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed. . . ."

4. Montana Code Ann. § 27-1-221 provides, in pertinent part, that:

> "In any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant."

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STATEMENT OF THE CASE

Appellants appeal from the Montana Supreme Court's decision affirming a judgment for appellee Mildred Flanigan in the amount of $1,494,170, including $1.3 million as punitive damages, for breach of an implied covenant of good faith and for negligence in terminating her "at will" employment contract. The punitive damage portion

of the judgment is six times the amount of actual and general damages awarded to respondent and almost 14 times the amount of damage Prudential Federal could reasonably have anticipated for breach of the employment contract. Neither cause of action upon which the judgment was based had been created by the Montana Supreme Court at the time Flanigan was terminated in 1980.

On April 15, 1980, Prudential Federal terminated Mildred Flanigan, an at-will employee, as part of a massive reduction in force required by the severe financial depression then facing the savings and loan industry. Fred Ogolin was the Vice President and Manager of the Prudential Federal branch in Butte, Montana where Flanigan was employed. The economic crises had severe effects upon Prudential Federal. Its revenues dropped from a net income of $6.8 million in 1978 to a loss of $2 million in 1982. Loan applications decreased from 115 in 1979 to 35 in 1980 and eventually to zero in 1981 when Prudential Federal eliminated its entire Mortgage Loan Department. Prudential Federal responded to the crisis by stripping every excess, including reducing its employees from approximately 220 to 70 over a four-year period. The bulk of these cuts took place in 1980, the year in which Flanigan also was terminated. Upon termination, Flanigan received six months severance pay, health and welfare benefits and her accumulated profit sharing benefits of $48,428.00.

On April 13, 1983, Flanigan filed this action against Prudential Federal and Ogolin, alleging initially that she had been terminated because of her age. The trial court dismissed these initial counts at the conclusion of evidence.

In February, 1985, two months before trial, Flanigan was allowed, over appellants' objections, to amend her Complaint to allege a breach of an implied covenant of good faith and negilgence in her termination. Both causes of action were first created by the Montana Supreme Court after Flanigan was terminated. *See Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213 (Mont. 1983); *Crenshaw v. Bozeman Deaconess Hosp'tal*, 693 P.2d 487 (Mont. 1984).

The jury returned a verdict in favor of Flanigan on the newly created causes of action, awarding actual damages of $94.170.00 for loss of wages and benefits and $100,000.00 general damages for emotional distress and mental anguish. In addition, the jury awarded punitive damages in the amount of $1,300,000. On April 29, 1985 the court entered judgment abainst both defendants for $1,494,170 plus interest from that date.

The statute upon which the court based the punitive damages award, Montana Code Ann. § 27-1-221, as in force in 1980, reads in part:

> In any action for a breach of an obligation *not arising from contract* where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

(Emphasis added.)

As of 1980, no Montana court had ever held that termination of an at-will employment contract could involve anything other than an obligation "arising from contract." Under the express language of the statute, violation of such an obligation could not result in an award of punitive

damages. Indeed, the Montana statute seemed clear that an at-will employee could be terminated without any reason (*see* Mont. Code Ann. § 39-2-503 (1980)) and the courts had consistently recognized that an at-will employee could be terminated "for a good reason, a bad reason or no reason at all." *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1054 (5th Cir. 1981).

Accordingly, appellants challenged the district court's judgment in its appellate brief to the Montana Supreme Court on the ground that they did not have fair notice that their conduct would be subject to punitive damages:

> [S]ince PFS, at the time the plaintiff's employment was terminated, could have had no notice that its conduct could subsequently be regarded as wrongful and since no question of outrage was present, it is patent that the district court erred in submitting the question of punitive damages to the jury. . . . This Court has emphasized that the concepts of elemental fairness would prohibit an award of punitive damages against an employer in [a] wrongful termination case where the employer could not know that its conduct would be regarded, at a much later date, as wrongful.

(Pages 47 through 57 of Prudential Federal's Appellate Brief to the Montana Supreme Court appear at the appendix hereto, p. 32, *infra.*)

The Montana Supreme Court squarely addressed appellants' notice argument, and rejected it, holding as follows:

> Appellants argue that they had no notice that their conduct would be subject to punitive damages. However, the punitive damage statute, § 27-1-221, MCA, was in effect at the time appellants committed the subject acts. Appellants were fully apprised that ma-

> licious or oppressive conduct on their part could lead to the imposition of punitive damages.

(App., p. 18, *infra.*) The court cited no other grounds for rejecting appellants' challenge based on lack of fair notice.

In their petition for rehearing and supporting memorandum, appellants' presented their notice argument in explicit constitutional terms, arguing that the Montana Punitive Damages Statute was unconstitutional under the Due Process, Contract, and Excessive Fines Clauses of the United States Constitution. That petition was denied on July 11, 1986.

On September 15, 1986, Prudential Federal petitioned the Montana Supreme Court to issue an order requiring that Flanigan place the punitive damages portion of the judgment in escrow pending the resolution of this appeal. That petition was denied by the Montana Supreme Court on September 18, 1986. Prudential Federal then submitted a petition seeking the same relief to Chief Justice [then Justice] Rehnquist. Chief Justice Rehnquist denied Prudential Federal's petition on the ground that "[t]he constitutional issues addressed in the application were not properly presented to the Montana Supreme Court until the petitioners filed for rehearing." *Prudential Federal Savings and Loan Association v. Flanigan,* — U.S. — (Sept. 25, 1986) (No. A-229).

This court has recently recognized that the three questions presented by appellants in this appeal are "important issues, which, in an appropriate setting, must be resolved." *Aetna Life Insurance Co. v. Lavoie*, — U.S. —, 106 S.Ct. 1580, 1589 (1986). Thus the only real issue is whether those issues were properly raised below, an issue involving mixed questions of federal and Montana law. With all due respect, appellants submit that Chief Justice Rehnquist's opinion is in error. Appellants challenged the Montana Punitive Damages Statute in its appeal to the Montana Supreme Court on the ground that it did not give fair notice. Moreover, the Montana Supreme Court explicitly considered and rejected that challenge. The question of whether a statute gives fair notice necessarily implicates the Due Process Clause. Further, appellants presented its fair notice argument in explicit constitutional terms in its petition for rehearing to the Montana Supreme Court, and there is a reasonable basis for the conclusion that each of the constitutional issues now before this Court were considered by the Montana Supreme Court in connection with that petition for rehearing.

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THE FEDERAL QUESTIONS WERE FAIRLY RAISED BELOW

I. PRUDENTIAL FEDERAL IMPLICITLY RAISED THE QUESTION OF THE UNCONSTITUTIONALITY OF THE MONTANA PUNITIVE DAMAGES STATUTE PRIOR TO ITS PETITION FOR REHEARING.

This Court recently restated the long-standing rule that it will not assume jurisdiction over a case and consider a federal question presented by that case unless that federal question was "*either* raised or squarely considered and resolved in state court." *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). Prudential Federal submits that the unconstitutionality of the Montana Punitive Damages statute was *both* raised and considered below.

A. THE DUE PROCESS CLAUSE.

In challenging the retroactive application of the statute to allow punitive damages for terminating an employment contract on the grounds of a denial of fundamental fairness and adequate notice, petitioners implicitly raised the federal constitutional issues. Notice and fairness are principles at the very core of due process.

This Court has in a long line of cases held that federal issues implicitly raised in the state courts are within its appellate jurisdiction. In *Braniff Airways v. Nebraska State Board of Eq. & A.*, 347 U.S. 590 (1954), the Court faced the question of whether a due process challenge to a Nebraska statute had been adequately presented to the state court. The statute provided for taxation by the state of the plaintiff airline's flight equipment. Plaintiff argued before

the state supreme court that because its aircraft never attained a taxable situs within Nebraska, the tax constituted a burden on interstate commerce in violation of the Commerce Clause. On appeal, this Court found that the "question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process." *Id.* at 599. The Court then proceeded to consider the due process question despite the fact that plaintiff had never specifically raised the question before the state court, holding as follows:

> [A]ppellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented.

Id. at 599.

Thus, the question before this Court is whether Prudential Federal's due process challenge was within the clear intendment of its contention in the state courts that the retroactive application of the Montana Punitive Damages Statute to its actions was fundamentally unfair and denied it proper notice. Such a contention necessarily raises due process concerns. This point is illustrated by this Court's opinion in *Vachon v. New Hampshire*, 414 U.S. 478 (1974). In that case, the defendant was convicted under a state statute of contributing to the delinquincy of a minor. Neither at trial nor before the state supreme court did the defendant explicitly invoke the Due Process Clause. He did, however, argue that the state had introduced insufficient evidence to support his conviction. The Court, over Chief Justice Rehnquist's dissent, held that the question of wheth-

er the state statute at issue was unconstitutional under the Due Process Clause was properly before it, and reversed the state supreme court's judgment.

While Chief Justice Rehnquist's views apparently remain unchanged, *Vachon* is still good law. Indeed, Chief Justice Rehnquist acknowledged as much in his opinion in *Illinois v. Gates*, 462 U.S. 213 (1983), a case in which the Court held that the State of Illinois had not properly presented below its argument that the federal exclusionary rule should be modified. The *Gates* Court noted that:

> several of our more recent cases have treated the so-called "not pressed or passed upon below" rule as merely a prudential restriction. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court reversed a state criminal conviction on a ground not urged in state court, nor even in this Court. Likewise, in *Vachon v. New Hampshire*, 414 U.S. 478 (1974), the Court summarily reversed a state criminal conviction on the ground, not raised in state court, or here, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment. The Court indicated in a footnote, *id.*, at 479, n. 3, that it possessed discretion to ignore the failure to raise in state court the question on which it decided the case.

Id. at 219. Further, the *Gates* Court explicitly declined to decide whether the " 'not pressed or passed upon below' rule is jurisdictional, as our earlier decisions indicate, . . . or prudential, as several of our later decisions assume . . . ." *Id.* at 222 (citation omitted).

That *Vachon* involved a criminal conviction should be of no consequence in the Court's analysis here. Due process protection extends to civil as well as criminal defendants. Moreover, as Prudential Federal argues in the substantive

portion of this brief, punitive damages are in the nature of criminal punishment and should be treated as such for purposes of applying constitutional safeguards.

B. THE EXCESSIVE FINES CLAUSE AND CONTRACT CLAUSE.

Even if it is assumed that Prudential Federal's arguments as to fundamental fairness and notice did not fairly alert the Montana Supreme Court to the applicability of the Excessive Fines Clause and the Contract Clause, because of the relative novelty of application of the Excessive Fines Clause generally and of the Contract Clause to judicial action, Prudential Federal's Excessive Fines Clause and Contract Clause arguments are still properly before this Court.

Prudential Federal submits that because the Due Process issue was clearly within the intendment of its fundamental fairness and notice arguments, and thus properly presented to the state courts, this Court is empowered to decide the Excessive Fines and Contract Clause issues. 28 U.S.C. § 1257(2) confers jurisdiction over "[f]inal judgments or decrees" where the validity of "a statute" has been drawn into question.

Consistent with this plain statutory language, this Court's classic formulation is that dismissal of an appeal is required in the "total absence . . . of *any* question . . . which would give this court jurisdiction." *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 399 (1836) (emphasis added). This Court, because it has jurisdiction of cases, not questions, has jurisdiction over the Excessive Fines and Contract Clause issues on the basis of Prudential Federal's implicit invocation of the Due Process Clause below.

In sum, the Montana Supreme Court's retroactive application of a punitive damages statute to allow for a punitive damages award of almost fourteen times the actual damages award on the basis of conduct lawful at the time it was engaged in can only be described as plain error. Moreover, appellants' challenge to that statute below on the grounds of fundamental fairness and failure of notice raised obvious due process concerns. Accordingly, this Court should note probable jurisdiction even if it were to conclude that the Montana Supreme Court did not consider the merits of Prudential Federal's petition for rehearing. Regardless, as will now be addressed, there is a reasonable basis to believe that the Montana Supreme Court did in fact consider the Due Process, Excessive Fines and Contract Clause issues raised in Prudential Federal's petition for rehearing.

II. THERE IS A REASONABLE BASIS FOR THE CONCLUSION THAT THE DUE PROCESS, EXCESSIVE FINES, AND CONTRACT CLAUSE ISSUES WERE CONSIDERED BY THE MONTANA SUPREME COURT IN CONNECTION WITH PRUDENTIAL FEDERAL'S PETITION FOR REHEARING.

After this Court's announcement of the *Aetna* decision, Prudential Federal filed a petition for rehearing and specifically raised the Due Process, Excessive Fines and Contract Clause issues. (The petition for rehearing and memorandum in support thereof are included in the appendix hereto, p. 44, *infra.*) The Montana Rules of Appellate Civil Procedure expressly allow a question that is decisive of the case to be raised in a petition for rehearing:

> A petition for rehearing may be presented upon the following grounds and none other: That some fact,

> material to the decision, or *some question decisive of the case* submitted by counsel, was overlooked by the court, or *that the decision is in conflict with* an express statute or *controlling decision* to which the attention of the court was not directed.

Mont. R. App. p. 34 (emphasis added). It is clear that the Montana Supreme Court knew that the Punitive Damage Statute, as applied to these facts, was being challenged on federal constitutional grounds. Indeed, it appears that the Montana Supreme Court considered and rejected the constitutional challenges.[1] Although the Montana Supreme Court, as most courts do, reserves the right to refuse to consider issues first raised on appeal, *see, e.g. Femling v. Montana State Univ.*, — Mont. —, 713 P.2d 996 (1986), the court has also recognized that constitutional issues that would be decisive "must be decided," even if not previously raised. *In re Clark's Estate*, 105 Mont. 401, 74 P.2d 401, 406 (1937); *but see, Lewis v. Anaconda Co.*, 168 Mont. 463, 543 P.2d 1339, 1342 (1975). Moreover, the Montana Supreme Court has repeatedly considered the merits of issues first raised in a petition for rehearing. For example, in *State v. City Court of Billings*, 662 P.2d 276 (Mont. 1983), the sole issue on appeal was whether a minor should be allowed to withdraw a guilty plea to a traffic violation because as a matter of law he was incompetent in the absence of his par-

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[1] The Order of the court denying the petition for rehearing includes no reason for the denial. (App., p. 24, *infra.*) Although Flanigan opposed the petition, in part, on the ground that appellants did not raise the notice issue in constitutional terms before the trial court, Flanigan also addressed the merits. The Order is signed by five of the seven justices and a footnote indicates a sixth judge would also deny the petition. The individual signatures imply that each of the justices considered the petition and rejected the arguments. If the court had denied the rehearing on procedural grounds, one would expect the Order to have so stated.

ents or counsel. On a petition for rehearing, the court considered for the first time whether the minor had been denied equal protection under the law. Similarly, in *State v. Kyle*, 628 P.2d 263 (Mont. 1981), the defendant claimed for the first time in a petition for rehearing that giving a *Sandstrum* instruction was constitutional error. The instruction had been unopposed at trial and had not been raised on the initial appeal. The court nevertheless considered the merits and reversed. *See also, Stone v. Belgrade School District*, 703 P.2d 136, 143 (Mont. 1985); *Erickson v. First Nat'l Bank*, 697 P.2d 1332, 1338 (Mont. 1985); *Rierson v. State*, 622 P.2d 195 (Mont. 1981) (*Compare Rierson v. State*, 188 Mont. 522, 614 P.2d 1020 (1980)), *Glacier Campground v. Wild Rivers, Inc.*, 182 Mont. 389, 597 P.2d 689, 701 (1979), *State v. Scanlon*, 174 Mont. 139, 569 P.2d 368, 383 (1977).

Because appellants drew into question in the Montana Supreme Court the constitutionality of the Montana statute, as interpreted by the Montana Supreme Court to apply to the facts of this case, on Due Process, Excessive Fines, and Contract Clause grounds, this Court has appellate jurisdiction. *See Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

THE QUESTIONS ARE SUBSTANTIAL

As this Court has indicated in its *Aetna* decision, the questions posed for review "are of such significance and difficulty that there is a substantial prospect that they will command four votes for review." *Organized Village of Kake v. Egan*, 80 S. Ct. 33, 35 (Brennan, Circuit Justice 1959).

Under Montana law, as it had been interpreted in 1980, and the public policy as clearly expressed in Mont. Code Ann. § 39-2-503 (1980), Prudential Federal was entitled to terminate Mildred Flanigan without notice and without cause. Any liability arising out of the termination of such an at-will employment contract was liability arising out of contract. Montana statutes clearly and expressly prohibited any award of punitive damages for any such violations. Based on newly created theories of liability, the Montana Supreme Court has now sustained an award of punitive damages for $1,300,000.00. That amount is almost fourteen times the amount of actual damages and the amount of actual damages was the maximum damages that Prudential Federal and Ogolin could ever have anticipated could be awarded for breach of the employment contract. Such an award, without prior notice, violates the notions of fundamental fairness upon which our system is founded.

I. THE RETROSPECTIVE IMPOSITION OF A $1.3 MILLION PUNITIVE DAMAGE AWARD VIOLATES BOTH THE DUE PROCESS CLAUSE AND THE EXCESSIVE FINES CLAUSE.

A. PUNITIVE DAMAGES ARE INDISTINGUISHABLE FROM A CRIMINAL PENALTY FOR PURPOSES OF DUE PROCESS AND EXCESSIVE FINES CLAUSE ANALYSIS.

This Court has consistently recognized that additional constitutional safeguards are accorded a defendant who is potentially subject to criminal penalties. *United States v. Ward*, 448 U.S. 242, 248-254 (1980). These additional safeguards are rooted, in part, in the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. The aims of punitive damages—

punishment and deterrence—are precisely those aims which the criminal law seeks to attain. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). Moreover, punitive damage awards often exceed any economic sanction allowable by the criminal law. *Rosenbloom*, 403 U.S. at 82-83. Accordingly, defendants subject to punitive damage awards should be accorded the same safeguards under the Due Process Clause and the Excessive Fines Clause as are accorded criminal defendants.

This Court has construed ostensibly civil penalties as warranting the additional procedural safeguards the Due Process Clause ensures criminal defendants. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67 (1963). The Court has also recognized that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977). Thus, the first question to be considered is whether punitive damages are sufficiently analogous to criminal sanctions to warrant full Due Process and Excessive Fines Clause protection.

This Court has established the following standard for determining whether a penalty imposed by statute is civil or criminal for purposes of constitutional analysis:

> [T]he tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character . . . . [are:] [1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5]

> whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

Kennedy, 372 U.S. at 168-69 (1963) (footnotes omitted). The application of this standard to the Montana Punitive Damage Statute, as interpreted by the Montana Supreme Court, makes clear that in Montana punitive damages should be indistinguishable from criminal punishment for the purposes of constitutional analysis.

As to the first test, it cannot be disputed that the deterrent purpose of punitive damages doctrine qualifies as a restraint. As this Court has held, punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). The Fifth Circuit has held that a fine imposed to deter future failure to comply with OSHA standards is a "restraint" under the *Kennedy* test. *Atlas Roofing Co. v. Occupational S&H Rev. Com'n*, 518 F.2d 990, 1001 (5th Cir. 1975). The fact that punitive damages are a private as opposed to a public fine does not change the fact that they are intended to deter or, in other words, to restrain certain forms of conduct.

As to the second through fifth tests under *Kennedy*, it is clear that in Montana punitive damages have historically been regarded as punishment, come into play only upon a finding of scienter, promote the traditional aims of punishment, and apply to behavior that is already a crime. While in a few states, punitive damages arguably have a compensatory as well as a punitive aspect, in Montana the law is clear that, both historically and presently, punitive damages

are imposed only "for the sake of example and by way of punishing the defendant." Mont. Code Ann. § 27-1-221. Thus, in Montana, just as in other states where punitive damages have no compensatory component, "[t]he objectives of an award of punitive damages are the same as those which motivate the criminal law. . . ." *Mattyasovsky v. West Towns Bus Co.*, 61 Ill.2d 31, 35, 330 N.E.2d 509, 511 (1975).

Further, in Montana a finding of scienter is a prerequisite to the award of punitive damages:

> A *guilty intent* on the part of the defendants is an essential to charge them with exemplary damages . . . "While every legal wrong entitles the party injured to recover damages sufficient to compensate for the injury inflicted, not every legal wrong entitles the injured party to recover exemplary damages. To warrant the recovery of such damages the act complained of must not only be unlawful, but must also *partake somewhat of a criminal or wanton nature.*"

Butcher v. Petranek, 181 Mont. 358, 593 P.2d 743, 745 (1979) (quoting *Luther v. Lee*, 62 Mont. 174, 204 P. 365, 367 (1922) (emphasis added)).

Moreover, as the *Luther* court made clear in holding that conduct giving rise to punitive damages must "partake somewhat of a criminal or wanton nature," in Montana much behavior that may be the subject of punitive damages is also a crime. This point is well-illustrated by the case of *Sheehan v. DeWitt*, 150 Mont. 86, 430 P.2d 652, 657 (1967), in which the Montana Supreme Court ordered a reduction of punitive damages assessed in an assault case because criminal remedies were also "available and were used in an attempt to achieve punishment or for sake of example."

Finally, as to the sixth and seventh tests under *Kennedy,* the Montana statute is clear on its face that there is no alternative purpose to punitive damages beyond punishment and deterrence. Moreover, even if there were a legitimate alternative purpose, the open-ended nature of punitive damages doctrine invites awards so excessive as to be incapable of characterization as anything but punishment. Indeed, the large amount of punitive damages awarded in the case at bar, $1.3 million despite actual and general damages of only $194,170 demonstrates the punitive nature of the award.

Thus, under every element of the *Kennedy* test, punitive damages in Montana are appropriately characterized as criminal in nature. The conclusion is inescapable that in Montana punitive damages are, at minimum, quasi-criminal for purposes of constitutional analysis. *See Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (punitive damages are "quasi-criminal").

B. THE MONTANA PUNITIVE DAMAGE STATUTE VIOLATES THE DUE PROCESS CLAUSE.

Despite their penal nature, however, punitive damages are imposed in Montana "unaccompanied by the types of safeguards present in criminal proceedings." *Smith,* 461 U.S. at 59. As a first matter, the Montana Punitive Damage Statute is impermissibly vague. As this Court held in *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939):

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes, all are entitled to be informed as to what the state commands or forbids.

The Montana Punitive Damage Statute falls far short of meeting this standard. Indeed, in Montana, "there is no established rule for ascertaining whether [the amount of a punitive damages award] is excessive." *Toeckes v. Baker*, 180 Mont. 109, 611 P.2d 609, 613 (1980). The Montana Supreme Court has repeatedly rejected the notion that punitive damages need bear any relation to actual damages. "[P]unitive damages may be awarded in cases where only nominal actual damages are awarded or even where no monetary value is placed on actual damages suffered." *Butcher*, 593 P.2d at 746.

The sole restraint upon a jury is that a punitive damage award may not be the result of "passion, prejudice or corruption." *Butcher*, 593 P.2d at 745 (quoting *Ramsbacher v. Hohman*, 80 Mont. 480, 489-90, 261 P. 273, 277 (Mont. 1927)). This is very broad latitude, indeed, and invites abuse. As this Court has noted, "Because juries are accorded broad discretion as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979).

Accordingly, it must be concluded that the Montana Punitive Damage Statute is impermissibly vague under the standards articulated by this Court:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges . . . and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

Even beyond its vagueness, the Montana Punitive Damage Statute, as interpreted by the Montana Supreme Court, works other violations of due process as well. Under the Due Process Clause, it is clear that fair warning to a defendant of the wrongfulness of a particular act is a prerequisite to punishment of the defendant for that act. As this Court held in *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964):

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from a retrospective judicial expansion of narrow and precise language.

At the time of Flanigan's termination in 1980, appellants had no notice that the actions for which they were ultimately found liable were wrongful. Indeed, neither of the two torts that appellants were found to have committed, breach of implied covenant of good faith and negligent termination, even existed in Montana in 1980. The inequity of this retrospective application becomes even more apparent when the Montana punitive damage standard, what little there is of it, is considered. In Montana, punitive damages may be assessed only against a defendant whose wrongful act was willful or malicious. The conceptual impossibility of a defendant willfully and maliciously breaching a tort duty not yet in existence needs little elaboration. The retrospective application of an economic sanction would be intolerable in a criminal setting and should be no less so with respect to the penal component of the civil law.

Even under a strictly civil standard, appellants' due process rights have been violated by the retrospective im-

position of liability in the case at hand. The law is clear that "retroactive [measures] . . . have to meet a burden not faced by [measures] that [have] only future effects." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Moreover, a retrospective measure must be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit*, 647 U.S. at 729. Finally, a retrospective imposition of civil liability violates the Due Process Clause if it is "particularly harsh and oppressive." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).

The Montana Supreme Court's retrospective imposition of punitive damages liability for torts which were not created until well after appellants' acts cannot be said to rationally further the express state purposes in imposing punitive damages—punishment and deterrence. Those purposes are simply not advanced by the punishment of a person whose acts were lawful at the time of commission. For similar reasons, this Court has noted that it "would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976) (citations omitted); *see also, Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68-70 (1910) (punitive damage award upheld as constitutional because "[t]he law in controversy has no *ex post facto* element or effect in it"). Further, the imposition of retroactive liability in the amount of $1.3 million for acts which were not wrongful at the time of their commission can only be described as harsh and oppressive.

C. THE MONTANA PUNITIVE DAMAGE STATUTE VIOLATES THE EIGHTH AMENDMENT.

The criminal nature of punitive damages is significant with respect to Eighth Amendment analysis as well. As this Court has stated, "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham*, 430 U.S. at 669 n.37. It should be noted, however, that there is ample support for the proposition that the Excessive Fines Clause should apply even to strictly civil fines. Significantly, the Framers of the Bill of Rights explicitly restricted the application of the *Fifth* Amendment "to criminal cases," 1 Annals of Cong. 782-83 (Gales & Seaton eds. 1834), in view of the fact that in the absence of such a clarification it could be construed as applying to both criminal and civil cases. However, they appended no such restriction upon the *Eighth* Amendment. This, despite the fact that the House debate on the Excessive Fines Clause in the First Congress immediately followed the debate on the Fifth Amendment *Id.*, at 781-82.[2]

The punitive damages awarded in this case can only be described as excessive. Petitioners have been held liable for such damages in the amount of $1.3 million dollars,

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[2] There is considerable support from the English experience that the sources of the Eighth Amendment—Magna Carta and the English Bill of Rights—would have encompassed punitive damages under the principles embodied in the Excessive Fines Clause. *See* 2 F. Pollock & F. Maitland, *The History of English Law* 513-15, 519-22 (2d ed. 1909); *Solem v. Helm*, 463 U.S. 277, 284 n.8, 285, 286 (1983).

despite the fact that the jury found only $194,170 in actual and general damages. Thus, the amount of the punitive damage award is more than six times the amount of the damages the jury found and almost fourteen times the amount petitioners could reasonably have anticipated for a breach of employment contract. Comparison with other penalties at civil and criminal law highlights the excessiveness of this amount. If petitioners had been found to have violated the Montana Human Rights Act, Mont. Code Ann. §§ 49-2-101 - 42-9-601 (1985), by discriminatorily terminating respondent's employment, they would have been required to "rectify any harm, pecuniary or otherwise" caused respondent, Mont. Code Ann. § 49-2-506(1)(b) (1985), but would not have been liable for "the payment of any punitive damages." Mont. Code Ann. § 49-2-506(2) (1985). If petitioners had been convicted of criminal fraud under Montana state law they could have been fined no more than $500. Mont. Code Ann. § 45-6-381 (1985). On the federal level, a defendant convicted of violations of the Clayton Antitrust Act (15 U.S.C. § 15 (1982)) or the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-1968 (1969)) is liable for no more than three times the amount of the actual damages he has caused. In no other context, either criminal or civil, is an economic penalty unlimited or a fine allowed which is six times the actual damages sustained. Under any measure, the punitive damage award in the case at bar is excessive.

II. THE MONTANA SUPREME COURT'S CREATION OF TWO NEW TORT CAUSES OF ACTION RETROSPECTIVELY APPLICABLE TO EXISTING CONTRACTS VIOLATES APPELLANTS' RIGHTS UNDER THE CONTRACT CLAUSE.

The effect of the Montana Supreme Court's action is to engraft onto the employment contract obligations that were never contemplated by the parties. It would be beyond dispute that the state had violated the Contract Clause if the torts of bad faith termination and negligent termination had been statutory creations of the legislature to be applied retroactively. *See Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Co.*, 431 U.S. 1. The fact that the Montana Supreme Court, rather than the Montana legislature, created these two new torts and imposed them upon pre-existing contractual relationships between employers and employees should make no difference for purposes of Contract Clause analysis.

The only possible bar to the application of the Contract Clause to the facts at hand is this Court's decision in *Tidal Oil Co. v. Flanagan,* 263 U.S. 444 (1924). In that case, the Court held that the reinterpretation of a statute by a state court, an essentially judicial function, did not implicate the Contract Clause. The Court did not consider whether the judicial creation of a new tort, an essentially legislative function, implicated the Contract Clause. Regardless, even if the language of the *Tidal Oil* case is construed as making the Contract Clause wholly inapplicable to judge-made law, that case has been significantly undermined by subsequent decisions of this Court.

The *Tidal Oil* decision rests on the proposition that judges do not make law. In a series of recent decisions, however, this Court, in assessing the retroactive application of federal judicial rulings on well-founded reliance interests, has recognized the "fact of legal life" that judges, as do legislators, make law and that "even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973); *see also, Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *Hill v. Stone*, 421 U.S. 289, *reh'g denied*, 422 U.S. 1029 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

Accordingly, in determining whether to apply a judicial constitutional decision, this Court now engages in a "process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." *Lemon*, 411 U.S. at 198. Thus, while this Court has not explicitly held that the judicial creation of a tort can violate rights under the Contract Clause, it has held that a reliance interest, the interest which the Contract Clause is designed to protect, can reach constitutional dimensions for purposes of retroactivity analysis.

Tidal Oil is further undermined by this Court's analysis of the term "law" in the First Amendment context. The First Amendment provides that "Congress shall make no law . . . ." Thus, the First Amendment not only uses the term "law" but, unlike the Contract Clause, specifically refers to the legislature. Nevertheless, this Court has established that the First Amendment applies to judicial decisions. *See, e.g., Nebraska Press Ass'n v. Stuart*,

427 U.S. 539 (1976). So, too, should the Contract Clause be applicable to judicial decisions, which can upset contractual expectations just as surely as a legislative enactment.

The contract at issue in the case at bar was entered into in 1952 and terminated in 1980. At both times, the contract was subject, as were all other contracts in Montana, to the general rule that no punitive damages may be awarded in contract actions. In 1982, the Montana Supreme Court imposed an implied covenant of good faith and fair dealing into employment contracts and in 1983 it interpreted obligations arising from this covenant as allowing recovery under tort law, including recovery of punitive damages. In 1984 ,the Montana Supreme Court created the tort of negligent termination of an employment contract. Thus, subsequent to the termination of the contractual relationship between petitioners and respondent, the Montana Supreme Court, in effect, added to all contracts a penalty provision, unlimited in the amount that could be awarded. Significantly, if the parties themselves had included a penalty provision of a similar nature in the contract, it would have been void under Montana law. *See Morgen & Oswood Const. Co. v. Big Sky of Mont.*, 171 Mont. 268, 557 P.2d 1017 (1977).

Petitioners relied upon the fact that at the time of the termination of their contract with respondent, they were subject only to the obligations created by that contract and to the liabilities established by that contract for its breach. This kind of reliance interest is precisely the kind of interest the Contract Clause was designed to protect. *United States Trust Co.*, 431 U.S. at 15. Moreover,

the retroactive imposition of punitive damages, as has been demonstrated, cannot be said to serve a "significant and legitimate public purpose," as may justify the impairment of contractual obligations. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Accordingly, this Court should find that the Montana Supreme Court's imposition upon a preexisting contractual relationship of liability for new torts violates petitioners' rights under the Contract Clause.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

DATED this 9th day of October, 1986.

Respectfully submitted,

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APPENDICES

No. 85-380

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

MILDRED FLANIGAN,

Plaintiff and Respondent,

-vs-

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOC., a federally chartered banking corporation, and FRED OGOLIN,

Defendants and Appellants.

APPEAL FROM: District Court of the Second Judicial District, In and for the County of Silver Bow, The Honorable Mark Sullivan, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

David J. Wing argued, Butte, Montana

For Respondents:

Poore, Roth & Robinson; Donald C. Robinson argued, Butte, Montana

Submitted: April 24, 1986
Decided: June 5, 1986

Filed: June 5, 1986

/s/ Ethel M. Harrison
Clerk

Mr. Justice Frank B. Morrison, Jr. delivered the Opinion of the Court.

Plaintiff brought this action in the First Judicial District Court to recover damages based upon wrongful termination from employment. The jury returned a verdict in favor of plaintiff, awarding her $94,170 in economic damages, $100,000 for emotional distress and exemplary damages in the amount of $1,300,000. Defendants appeal. We affirm.

Mildred Flanigan (respondent) was hired as a teller on January 28, 1952, by Prudential Federal Savings and Loan Association. She worked in various capacities until April 15, 1980, at which time Fred Ogolin, Vice President and Manager of Prudential Federal Savings and Loan, Butte Branch, fired her. Hereafter, the two defendants will be referred to jointly as the appellants unless it is necessary to distinguish them by specific reference.

The issues presented for review involve substantial credible evidence questions. We therefore will detail the facts and, as we must, in a light favorable to respondent. First National Bank in Libby v. Twombly (Mont. 1984) 689 P.2d 1226, 1230, 41 St.Rp. 1948, 1952; Jacques v. Montana National Guard (Mont. 1982), 199 Mont. 493, 503, 649 P.2d 1319, 1325.

Following commencement of her employment, respondent worked as a teller for approximately 14 years, performing in a satisfactory fashion. In 1966 she became branch office bookkeeper. That position was eliminated because of a change in technology and in 1973, the respondent moved into the mortgage loan department where she became branch general clerk. She maintained this

position until 1976, when she became assistant loan counselor. Respondent performed satisfactorily in all positions.

On December 7, 1979, prior to respondent's termination, the president of Prudential prepared an interoffice memorandum entitled "Personnel Information and Policy Change." This memorandum was distributed to all employees formally advising them of economic turndowns and the resulting need of Prudential to reduce its work force. The memorandum was discussed at the staff meeting in Butte, Montana, on December 13, 1979. Respondent was present. In the latter part of January, 1980, respondent was advised by Fred Ogolin that her position as assistant loan counselor was to be terminated as of June 1, 1980. After discussion, Ogolin advised respondent of a teller training program in Salt Lake City, Utah, and asked her if she desired to broaden her job skills. Respondent accepted the offer and on March 2, 1980, she attended the week-long program. On March 18, 1980, after her return to Butte, respondent began working as a teller. Less than one month later, respondent was terminated without notice and without hearing. She was given six months pay as a severance benefit and paid her accumulated profit sharing benefits of $48,428.02. After respondent was terminated, she was offered, by letter dated June 9, 1981, a part-time position as teller. After consultation with counsel, the offer was rejected.

Within two weeks following her termination, respondent filed an age discrimination complaint with the Human Rights Commission. She received a "right to sue" letter and filed this complaint on April 13, 1983.

After consolidating several of appellants' issues, we find the following questions govern the outcome of this appeal:

1. Was there substantial credible evidence to support submission of respondent's case to the jury based upon breach of the implied covenant of good faith and fair dealing?

2. Did the District Court err in its treatment of the negligence issue? As sub-issues we determine whether it was error for the trial court to allow amendment of the pleadings; whether the negligence count was barred by the statute of limitations; whether comparative negligence was applicable; and whether workers' compensation was the exclusive remedy?

3. Did the District Court err in allowing opinion testimony from expert witnesses about the covenant of good faith and fair dealing?

4. Was it error to refuse admission of defendant's Exhibit U.U.?

5. Did the District Court err in failing to reduce damages by $26,290.53, the amount the plaintiff would have received had she not refused to accept the position as a part-time teller following her termination?

6. Was there substantial credible evidence to submit punitive damages to the jury? We include within this issue the question of whether punitive damages were excessive as a matter of law.

ISSUE ONE

Was there substantial credible evidence to support submission of respondent's case to the jury based upon breach of the implied covenant of good faith and fair dealing?

The principal argument advanced by appellants is that Prudential was experiencing severe economic conditions and terminated the respondent in a legitimate reduction-in-force move designed to curb costs. Appellants argue that a Montana jury should not be a silent partner in every decision made to terminate employees. Reliance is placed upon the language of Professor Gary Murg and Clifford Scharman, in an article titled "Employment at Will: Do the Exceptions Overwhelm the Rule?" 23 Boston College L.R. 329, 372 (1982), wherein it was said:

> . . . A jury should not be entitled to second guess an employer's policy or practices to determine that they are insufficient justifications for a discharge. Such an approach would leave virtually all personnel practices open to communal comment. A personnel practice that is justifiable to one jury may be found pernicious to another. The likely result would then be to subject employers to the threat of suit in every instance of a discharge as the employee attempts to find a jury sympathetic to his cause. Thus, the only issue that should be posed to the jury is whether the personnel practice was applied equally to all employees. It is submitted that if an employer's promise of continued employment is to be given contractual force courts must limit the discretion of the jury in determining what constitutes good cause.

Respondent disputes that she was terminated as part of a reduction-in-force program. She points to the testi-

mony of Ogolin, who fired her. Ogolin testified at trial that, but for the respondent's alleged poor performance as a teller, she would have remained employed by Prudential. In earlier testimony Ogolin had said that under no circumstances would the respondent have remained with the company.

Respondent argues that the dual and contradictory reasons for termination advanced at trial by the appellants reveal an arbitrary, capricious and bad faith firing. Respondent notes the following Ogolin testimony which is supportive of a reduction in force:

> Q. (By Mr. Robinson) . . . Would Mildred have been let go if in the three weeks she worked as a teller she had appeared to be performing as well as any other average teller in your operation?
>
> A. (By Mr. Ogolin) Yes. I had already made the decision that Mildred's job was going to be, or position was going to be eliminated. . . .
>
> Q. So, how well she performed in that three-week period *had nothing to do with your decision to terminate her on April 15, 1980, is that true?*
>
> A. *That's correct.* That decision was made *before* she performed as a teller trainee in the Butte office.
>
> * * *
>
> Q. *So, you wouldn't have considered her for staying no matter how she had performed as a teller, good or bad, is that true?*
>
> A. *That's right, yes.*
>
> Q. That would be true even if she had performed as well as Connie Selon who had worked as a teller for 4 years?
>
> A. *Yes, that's true.*

(Tr. pp. 437-438) (Emphasis supplied.)

Several days later Ogolin, testifying in his own defense, gave this contradictory testimony:

> Q. You put in a lot of testimony *today* about the fact that she didn't perform well according to your opinion but it's true, is it not, *as you testified last week* that it wouldn't have made any difference how she had performed, *she still would have lost her job,* isn't that true?
>
> * * *
>
> A. *Yes,* I testified to that. . . .
>
> * * *
>
> Q. Are you changing your testimony from last Wednesday?
>
> A. I'm saying that the facts were not that.
>
> Q. My question again one last time, *if she had performed as well as another teller, could she have kept her job?*
>
> A. *Yes.*
>
> Q. Oh. So, *you have changed your testimony from last Wednesday, is that correct?*
>
> A. *Yes.*

(Tr. pp. 1058-1059) (Emphasis supplied.)

Additionally, respondent argues that the employer violated its own written policies regarding job security and job rights by terminating the respondent without notice and without hearing. Further, respondent maintains that she was entitled to be recalled to fill vacant positions but that she was not recalled except insofar as she was offered a part-time teller position.

Respondent offered evidence that her discharge was motivated by vindictiveness on the part of Ogolin. Because of seniority, respondent had a superior right to vacation time, even before Ogolin. She testified that when she asked the reason for her termination, Ogolin stated that she was "not making it as a teller" and that she was "vindictive" because she had used her seniority to select her four weeks of vacation during the month of August.

The reason for discharge was disputed by Prudential. Several months later, Prudential's president informed respondent, for the first time, that she was discharged as part of a company wide reduction in force. The president stated that "seniority or past performance was not considered" in the decision to discharge.

Implicit throughout the respondent's case is the allegation that she was terminated because of her age and because of a desire on the part of the employer to cut costs associated with respondent's pension. Younger and less experienced employees, who had lower composite performance evaluations and who occupied positions respondent previously held, remained working after respondent's firing. Ogolin admitted that any errors respondent made as a teller were not sufficient to warrant discharge. Ogolin further admitted that respondent was never warned, reprimanded or counseled about her performance as a teller, all prerequisites to termination according to Prudential's own policies. Prudential supervisors admitted that 60 days to six months were normally required before one could become proficient as a teller. The decision to discharge respondent, however, was made after respondent worked less than three weeks in the teller position.

A long-term employee has an expectation of continued employment provided that the employee's work performance is satisfactory. Dare v. Montana Petroleum Marketing Co. (Mont. 1984), 687 P.2d 1015, 1020, 41 St.Rep. 1735, 1740. Of course, this does not foreclose an employer from engaging in legitimate reductions in force necessary to maintain the economic vitality of the company. However, there is evidence in this record, from the lips of Ogolin himself, that respondent was fired for poor work performance. The jury could have relied upon this latter testimony and therefore concluded there was no reduction in force.

The standard for ascertaining whether factual issues exist in a wrongful discharge case were articulated by the majority opinion in *Dare*, supra. We there said:

> The record discloses remaining genuine issues of material fact regarding Dare's wrongful discharge claim. The parties relate widely divergent versions of Dare's work performance and reasons for her termination. It therefore remains for the trier of fact to resolve these issues, including the reason for Dare's termination *and whether she was fired for cause.* (Emphasis supplied.)

687 P.2d at 1019, 41 St.Rep. at 1739.

The cause referred to in *Dare* is different from the "good cause" applicable in determining the propriety of an employee's termination under a contract for a specified term. In Pugh v. See's Candies, Inc. (Cal.App. 1981), 116 Cal.App.3d 311, 171 Cal. Rptr. 917, the California Appeals Court for the First District, Division 1, noted the distinction as follows:

> By what standard that burden is to be measured will depend, in part, upon what conclusions the jury draws as to the nature of the contract between the parties. The terms "just cause" and "good cause," "as used in a variety of contexts . . . have been found to be difficult to define with precision and to be largely relative in their connotation, depending upon the particular circumstances of each case." (*R. J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 144, 32 Cal.Rptr. 545.) Essentially, they connote "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." (Id., at p. 145, 32 Cal.Rptr. 545.) Care must be taken, however, not to interfere with the legitimate exercise of managerial discretion. "Good cause" in this context is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term. (Footnote omitted.)

116 Cal.App.3d at 330, 171 Cal.Rptr. at 927-928.

In *Dare*, supra, the heightened expectations resulting from long-term employment were the primary basis for reversing summary judgment in favor of the employer. Justice Weber, writing for the majority, said:

> The presence of such facts [long-term employment] indicates that the term of employment has gone beyond the indefinite period contemplated in the at will employment statute, section 39-2-503, MCA, and is founded upon some more secure and objective basis. In such cases, the implied covenant protects the investment of the employee who in good faith accepts and maintains employment reasonably believing their job is secure so long as they perform their duties satisfactorily.

687 P.2d at 1020, 41 St.Rep. at 1740.

Closely allied with Justice Weber's reasoning in *Dare* is the California case of Cleary v. American Airlines, Inc. (Cal.App. 1980), 111 Cal.App.3d 443, 168 Cal.Rptr. 722, wherein the Second District Court of Appeal, Division 1, stated:

> Two factors are of paramount importance in reaching our result that plaintiff has pleaded a viable cause of action. One is the longevity of service by plaintiff—18 years of apparently satisfactory performance. Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result of this covenant, a duty arose on the part of the employer, American Airlines, to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain—benefits described in the complaint as having accrued during plaintiff's 18 years of employment.

111 Cal.App.3d at 455, 168 Cal.Rptr. at 729.

The covenant, in a long-term employment situation, only requires the employer to have a fair and honest reason for termination. An employee's incompetence or lack of loyalty certainly constitute sufficient reasons under this standard. However, as in this case, an employer may recognize by company policy an obligation to provide warnings and an opportunity for change. Respondent's evidence, if believed, proves that appellants failed to give respondent any opportunity to correct mistakes or otherwise conform her conduct.

Appellants' motivation for the termination was rendered suspect by Ogolin's inconsistent testimony on the

witness stand. The jury may well have chosen not to believe appellants' whole case, in light of Ogolin's lack of credibility.

Respondent's 28 years of employment by Prudential gave her a secure and objective basis for believing that, if her work was satisfactorily performed, her employment would continue. From the evidence presented, the jury could have found that appellants had no fair and honest cause for discharge and, in fact, had ulterior motives. A case for jury deliberation was presented on the issue of wrongful termination.

ISSUE TWO

Did the District Court err in its treatment of the negligence issue? As sub-issues we determine whether it was error for the trial court to allow amendment of the pleadings; whether the negligence count was barred by the statute of limitations; whether comparative negligence was applicable; and whether workers' compensation was the exclusive remedy?

Appellants argue that the negligence count was added five years after termination and was thus barred by the three year statute of limitations. This argument was recently disposed of in Sooy v. Petrolane Steel Gas, Inc. (Mont. 1985), 708 P.2d 1014, 1017, 42 St.Rep. 1702, 1705-1706. A complaint can be amended to include a new theory of recovery where the basis for the new claim is the same occurrence involved in the old claims. In this case, respondent argues that the negligence claim and the claim for breach of implied covenant of good faith and fair dealing arise out of the same occurrence, include the same

facts and only involve different legal theories. We agree. The amendment was proper.

Negligence has been recognized by this Court to be a proper basis for recovery in wrongful termination cases. Negligence was approved by this Court in Crenshaw v. Bozeman Deaconess Hospital (Mont. 1984), 693 P.2d 487, 493, 41 St.Rep. 2251, 2259, wherein we said:

> The allegation of negligence was clearly established in respondent's complaint. We hold the trial court committed no error in issuing the instruction to the jury.

In *Crenshaw,* this Court relied upon the fact that plaintiff's expert on personnel management testified that the discharge was made without a proper investigation by the hospital administrator. Likewise, in this case, expert testimony revealed that appellants committed 13 different violations of Prudential firing policies. We find the precedent of *Crenshaw* compelling and hold the negligence theory was proper.

Appellants argue that workers' compensation is the exclusive remedy for negligence. However, appellants cite no authority for the argument that there is a workers' compensation remedy available for wrongful termination in employment. In fact, the tort of wrongful termination does not occur until the employment is terminated. The plaintiff could hardly be injured in the course and scope of employment by a tort that occurred subsequent to the existence of the employment itself.

Finally, appellants contend that they were entitled to an instruction on comparattive negligence. Again, no authority is cited to support this proposition. Ordinarily, com-

parative negligence must relate to the same occurrences which are the subject of the negligence alleged against defendant. Blair v. Eblen (Ky. 1970), 461 S.W.2d 370; Ferrara v. Leventhal (N.Y.App.Div. 1977), 56 A.D.2d 490, 392 N.Y.S.2d 920. The negligence relied upon in the case before us involves negligent failure to review prior performance and work history. Appellants do not contend that respondent violated any duty in this regard. Any negligence of respondent during the course of employment, such as work mistakes, would go to the question of whether there was a reasonable basis for the firing. That question was submitted to the jury.

In awarding punitive damages the jury found appellants' conduct to be "willful". Even if the trial court should have submitted respondent's negligence to the jury, any error in that regard would be harmless. Negligence is not a defense to willful conduct. Simonson v. White (Mont. 1986), 713 P.2d 983, 987-988, 43 St.Rep. 133, 139.

ISSUE THREE

Did the District Court err in allowing opinion testimony from expert witnesses about the covenant of good faith and fair dealing?

Appellants claim error in the District Court's admission of opinion testimony from expert witnesses about the covenant of good faith and fair dealing. Again, this issue was resolved in Crenshaw v. Bozeman Deaconess Hospital, supra. The rationale for our holding in *Crenshaw* was stated by Justice Harrison:

> The instant case is not a scenario of simple facts. Fault arising from breach of implied covenant of good faith and fair dealing is not easily comprehensible to the average person. [The expert's] testimony was based on professional expertise and experience which the in-

> dividual jury members were unlikely to possess. Her testimony assisted the trier of fact by providing the jury with information and a prospective (sic) beyond the common experience of a lay juror. (Citations omitted.)

693 P.2d at 494, 41 St.Rep. at 2260.

As noted previously, the experts who testified on behalf of respondent found 13 different violations of Prudential policies and personnel practices. Appellants complains (sic) that one expert was permitted to evaluate whether Prudential followed its policy as established in one of Prudential's own memoranda. However, appellants failed to object at time of trial. It is fundamental that a party may not raise, for the first time on appeal, alleged errors pertaining to the introduction of evidence or testimony that was not objected to at the time of trial. Scofield v. Estate of Wood (Mont. 1984), 683 P.2d 1300, 1302, 41 St.Rep. 1212, 1214-1215.

In *Crenshaw,* supra, this Court approved expert testimony interpreting written employment policies. We said:

> The trier of fact's experience does not extend to Hospital disciplinary guidelines, much less the ability to evaluate the propriety of such guidelines. . . . The trial court in its broad discretion admitted the expert testimony. The trial court's order will not be disturbed on appeal in the absence of a clear showing of a manifest abuse of discretion. (Citations omitted.)

693 P.2d at 495, 41 St.Rep. at 2261-2262.

Pursuant to the precedent established by *Crenshaw,* supra, respondent was justified in utilizing expert testimony. In permitting the expert witnesses to interpret em-

ployment policies, the trial court acted within its discretion.

ISSUE FOUR

Was it error to refuse admission of defendant's Exhibit U.U.?

Appellants contend that the trial court erred in refusing to admit a summary of teller transactions performed by various tellers during the few days that respondent worked as a teller prior to her termination. The exhibit was objected to and the objection was sustained on the grounds that it was a compilation of after-acquired evidence regarding respondent's performance; that the information was not known to appellants at the time of termination; and that Ogolin had not examined the compilations for the purpose of making a decision about firing respondent. Therefore, the after acquired-evidence could not be used to support termination at time of trial. See Swanson v. St. John's Lutheran Hospital (1979), 182 Mont. 414, 422, 597 P.2d 702, 706-707. The trial court ruling was correct. In any event, Ogolin was allowed to testify as to the essence of the information contained in the exhibit. Any error on the part of the trial court in refusing the exhibit was harmless in light of Ogolin's testimony.

ISSUE FIVE

Did the District Court err in failing to reduce damages by $26,290.53, the amount the plaintiff would have received had she not refused to accept the position as a part-time teller following her termination?

Appellants contend that respondent's award for loss of wages, that sum being $94,170, should have been reduced by the trial court in the amount of $26,290.53, based on re-

spondent's alleged failure to mitigate damages by accepting Prudential's offer of part-time employment.

There was abundant evidence that the respondent sought to mitigate her damages by seeking other employment. However, the law does not require respondent to mitigate damages by accepting inferior employment from her former employer. The rule was stated by the California Supreme Court in Parker v. Twentieth Century-Fox Film Corp. (Cal. 1970), 474 P.2d 689, wherein the court said:

> [B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a *different or inferior kind* may not be resorted to in order to mitigate damages. (Emphasis supplied.) (Citations omitted.)

474 P.2d at 692.

Appellants requested, and were given, a complete and accurate mitigation instruction. The instruction reflected the case law, above cited, stating that a wrongfully terminated person has a duty to reasonably seek and maintain other employment, but no duty to accept inferior employment. We find the trial court did not err in its handling of this issue.

ISSUE SIX

Was there substantial credible evidence to submit punitive damages to the jury? We include within this issue the question of whether punitive damages were excessive as a matter of law.

We have detailed the evidence presented by respondent in support of her claim for breach of implied covenant of good faith and fair dealing. That evidence need not be restated here. In addition to the evidence previously set forth, testimony from appellants' president revealed a calloused attitude toward older employees. Prudential's Donovan referred to older employees as "dead wood", "old dead wood", and "ballast". He reiterated at time of trial that he considered Mildred Flanigan to be "ballast".

The jury could have inferred malice from the lack of candor on the part of appellants. Appellants' position at time of trial was that respondent was terminated for inadequate performance yet, 14 months later, appellants offered respondent a part-time job. Further, Ogolin first testified that respondent was terminated because of a reduction in force and then later testified that she was terminated because of inadequate work performance. The jury may have chosen to believe she was terminated because of Ogolin's resentment stemming from respondent depriving him of the choicest vacation times.

Appellants argue that they had no notice that their conduct would be subject to punitive damages. However, the punitive damage statute, § 27-1-221, MCA, was in effect at the time appellants committed the subject acts. Appellants were fully apprised that malicious or oppressive conduct on their part could lead to the imposition of punitive damages. Our decisions in First National Bank in Libby v. Twombly (Mont. 1984), 689 P.2d 1226, 41 St.Rep. 1948, and Tribby v. Northwestern Bank of Great Falls (Mont. 1985), 704 P.2d 409, 42 St.Rep. 1133, support this result.

Appellants complain that the punitive damages are excessive and based upon passion or prejudice. Section 25-11-

102(5), MCA, provides that a verdict or a decision may be vacated and a new trial granted "on the application of the party aggrieved for . . . excessive damages appearing to have been given under the influence of passion or prejudice."

Appellants failed to raise the issue of excessiveness in post-trial motions. This Court need not now consider that contention on appeal. In Mitchell v. Thomas (1932), 91 Mont. 370, 8 P.2d 639, defendant claimed damages were excessive, showing passion and prejudice on the part of the jury. The Supreme Court stated:

> A motion for a new trial was not made, and the trial judge was not given an opportunity to pass upon this feature of the case. If he had been asked to reduce the amount of the verdict, he might have done so. We have no substantial basis for changing it.

91 Mont. at 383, 8 P.2d at 643.

This Court has long adhered to the principle that "[t]he amount to be awarded as damages is properly left to the jury and this Court will not substitute its judgment for that of the jury . . ." Salvail v. Great Northern Railway Co. (1970), 156 Mont. 12, 31, 473 P.2d 549, 560. While the punitive damages in this case are large, they are within the discretion of the jury and were not raised as error in post-trial motions.

Judgment for the plaintiff is affirmed in all respects.

Frank B. Morrison
Justice

We concur:

/s/ J. A. Turnage
Chief Justice

/s/ John C. Sheehy

/s/ William E. Hunt, Sr.
Justices

Mr. Justice Fred J. Weber dissents as follows:

I dissent from that portion of Issue Six of the majority opinion which concludes that the punitive damages awarded in this case were not excessive. The jury returned the verdict for the plaintiff giving her economic damages of $94,170, emotional distress damages of $100,000 and punitive damages of $1,300,000. I conclude that under the factors hereafter described, the award of punitive damages in the amount of $1,300,000 was excessive.

Section 27-1-221, MCA, contains the statutory provisions with regard to punitive damages. Until the 1985 amendment which is not pertinent in this case, that statute provided for the award of punitive damages where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, and allowed the award of damages for the sake of example and by way of punishment. No additional factors were set forth. In 1927 this Court described what a jury should consider in setting the amount of a punitive damage award:

> "The jury should take into consideration the attendant circumstances, such as the malice or wantonness of the act, the injury intended, the motive for the act, the manner in which it was committed and the deterrent effect upon others . . . According to the general rule, it is proper for the jury to consider defendant's wealth and pecuniary ability in fixing the amount of damages." 17 C.J. 994, 995. . . . "The public good in the restraint of others from wrongdoing, as well as the punishment of the offender, is to be considered in estimating exemplary damages." Ward v. Ward, 41 Iowa, 686. Based on those determinative factors and general principles, in this state *the rule is that the amount of exemplary damages must be reasonable.* (Emphasis supplied).

Ramsbacher v. Hohman (1927), 80 Mont. 480, 489, 261 P. 273, 277.

In the case of Butcher v. Petranek (1979), 181 Mont. 358, 361, 593 P.2d 743, 744, this Court restated the rule in Montana that a jury award of punitive damages would not be disturbed unless the amount, considered in connection with the facts, indicates the jury was influenced by passion, prejudice, or corruption. My research indicates that there is a great difference of opinion in the various states on the manner and extent of review of punitive damages, both by the trial court and the appellate court. However, I do note that many courts have concluded that it was appropriate to set aside punitive damage awards on the basis of passion and prejudice, or similar rationales.

I approve the factors to be considered in reviewing punitive damages as set forth in Mallor and Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639 (1980). These factors are essentially as follows:

1. the severity of the harm likely to occur from defendant's conduct;
2. the degree of reprehensibility of defendant's conduct;
3. the profitability of the conduct;
4. the financial position of the defendant;
5. the amount of compensatory damages;
6. the costs of litigation;
7. potential criminal sanctions; and
8. other civil actions against the defendant based on the same conduct.

Because this is a dissent, I will not extensively analyze the facts as they apply to each of these factors. I do suggest that a clear contradiction is shown if we apply factor (5) to the present case. The amount of the compensatory damages totals $194,170. This factor alone raises a significant question as to the punitive damages award of $1,300,000. As I seek to apply the above factors in my review of the facts of this case including the outrageous conduct on the part of the defendant, I conclude that an award of $1,300,000 as punitive damages is excessive.

This case tends to suggest the very real interplay which is possible on the jury's part with regard to the various categories of damages. We speak of economic damages and emotional distress damages as being compensatory in nature and different in character from punitive or exemplary damages. I'm not certain that the jury made that distinction. As an example, had the jury not been allowed to award punitive damages in excess of one million dollars as was done in this case, the facts would seem to warrant an award for emotional distress in excess of $100,000.

I would therefore reverse the judgment and remand for new trial so the plaintiff would have an adequate opportunity to recover all types of damages which she may prove.

/s/ Fred J. Weber
Justice

We concur in the foregoing dissent of Justice Weber.

/s/ L. C. Gulbrandson
Justice

/s/ John Conway Harrison
Justice

WHEREUPON, On consideration, it is now here ordered and adjudged by this Court that the Judgment of the Court below, entered in this cause on the 29th day of April A.D. 1985 is affirmed in all respects.

Costs in this Court:

Appellant Appearance—$75.00 & Cross-Appellant $75.00.

Respondent Appearance—

June 5 A.D. 1986.

You, THEREFORE, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

WITNESS: The Honorable J. A. Turnage, Chief Justice of the Supreme Court of the State of Montana, this 11th day of July A.D. 1986.

/s/ Ethel M. Harrison
Clerk of the Supreme Court of the
State of Montana

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 85-380

MILDRED FLANIGAN,

Plaintiff and Respondent,

v.

PRUDENTIAL FEDERAL SAVINGS
AND LOAN ASSOCIATION, a
federally chartered banking
corporation, and FRED OGOLIN,

Defendants and Appellants.

ORDER

(Filed July 11, 1986)

PER CURIAM:

The petition for rehearing is denied.

DATED this 11th day of July, 1986.

/s/ J. A. Turnage
Chief Justice

/s/ Frank B. Morrison, Jr.
/s/ John Conway Harrison
/s/ L. C. Gulbrandson
/s/ William E. Hunt, Sr.
Justices

Mr. Justice John C. Sheehy would also deny the petition for rehearing.

ATTEST: A true copy

/s/ Ethel M. Harrison
Clerk of Supreme Court
Helena, Montana

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 85-380

MILDRED FLANIGAN,

Plaintiff and Respondent,

v.

PRUDENTIAL FEDERAL
SAVINGS & LOAN ASSOC.,
a federally chartered bank-
ing corporation, and FRED
OGOLIN,

Defendants and Appellants.

ORDER

(Filed September 18, 1986)

PER CURIAM:

The petition for writ of injunction pending appeal filed herein by defendants and appellants on September 15, 1986, is hereby denied.

The Clerk is directed to mail a true copy hereof to counsel of record for the respective parties.

DATED this 18th day of September, 1986.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison
/s/ Frank B. Morrison, Jr.
/s/ Fred J. Weber
/s/ John C. Sheehy
/s/ L. C. Gulbrandson
/s/ William E. Hunt, Sr.
Justices

IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT

Of the State of Montana

In and for the County of Silver Bow

No. 83-C-174

MILDRED FLANIGAN,

Plaintiff,

vs.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered banking corporation, and FRED OGOLIN,

Defendants.

JUDGMENT

This cause came on regularly for trial before the Court sitting with a jury on Tuesday, April 16, 1985, Donald C. Robinson, Esq., and Shelley A. Hopkins, Esq., of Poore, Roth & Robinson, P.C., Butte, Montana, appearing as attorneys for Plaintiff, and John L. Peterson, Esq., and Dierdre Caughlan, Esq., Butte, Montana, appearing as attorneys for Defendants, and the Court and the jury having heard the testimony and evidence, and having examined the proofs offered by the respective parties, and the cause having been argued by the respective parties and submitted to the jury for its decision by way of a Special Verdict, and after deliberating thereon and being fully advised in the premises, the jury on April 26, 1985, returned the following:

"SPECIAL VERDICT

WE, the jury in the above-entitled action, find the following Special Verdict on the issues submitted to us:

(It is required that eight (8) of you agree on the answer to each issue, but the same eight (8) jurors need not agree on each issue. You are to consider and answer in the order given.)

ISSUE NO. 1

Did the Plaintiff prove, by a preponderance of the evidence that the Defendant, PRUDENTIAL FEDERAL SAVINGS, violated its obligation of good faith and fair dealing owed to the Plaintiff in the process of making its decision to terminate Plaintiff's employment, or in the actual termination?

ANSWER: YES X NO —

Regardless of your answer, please answer the following:

ISSUE NO. 2

(A) Did the Plaintiff prove, by a preponderance of the evidence that Defendants, PRUDENTIAL FEDERAL SAVINGS and/or FRED OGOLIN, acted negligently in the process of making their decision to terminate the Plaintiff's employment, or in the actual termination?

ANSWER: YES X NO —

(B) If your Answer to Issue 2, Part (A) is "Yes," did the conduct of the Defendant(s) constitute willful disregard of duty amounting to actual or implied malice?

ANSWER: YES X NO —

ISSUE NO. 3

If you have answered either Issue No. 1 and/or Issue No. 2(A) or 2(B) with a "Yes," then please state the amount of damages you award to the Plaintiff as to:

(A) Financial losses of wages and other benefits of employment proximately caused by the acts of the Defendant(s):

AMOUNT: $94,170.00

(B) General damages for emotional distress and mental anguish proximately caused by the acts of the Defendant(s):

AMOUNT: $100,000.00

(C) Exemplary (punitive) damages to be assessed against the Defendant(s).

AMOUNT: $1,300,000.00

(Not allowed if the only "Yes" answer is to Issue 2, Part A.)

DATED this 26 day of April, 1985.

/s/ Kenneth B. Woodring
FOREPERSON"

NOW, THEREFORE, by reason of the law and the findings of the jury by way of the Special Verdict,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, and this does Order, Adjudge, and Decree, as follows:

1. The Plaintiff shall have judgment against Defendants for the sum of ONE MILLION FOUR HUNDRED NINETY-FOUR THOUSAND ONE HUNDRED SEVENTY AND NO/100 ($1,494,170.00) DOLLARS, with

interest thereon, from date of this judgment, at the rate of ten (10%) percent per annum, until satisfied in full.

2. That Plaintiff have judgment against Defendants for her costs herein incurred, and disbursements allowed by law, in an amount to be determined by this Court at the hearing thereon.

DATED this 29th day of April, 1985.

/s/ Mark P. Sullivan
DISTRICT JUDGE

No. 85-390

IN THE SUPREME COURT OF
THE STATE OF MONTANA

1986

MILDRED FLANIGAN,

Plaintiff and Respondent,

vs.

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOC., a federally chartered banking corporation and FRED OGOLIN,

Defendants and Appellants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Prudential Federal Savings & Loan Association and Fred Ogolin, the appellants above-named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the Supreme Court of the State of Montana affirming the award of punitive damages, which decision was entered and petition for rehearing denied in this action on July 11, 1986.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

DATED this 11th day of August, 1986.

DUNLAP & CAUGHLAN

By: /s/ Dierdre Caughlan
Attorneys for Appellants
27 West Broadway
Butte, Montana 59701

LARSEN, KIMBALL, PARR
& CROCKETT

By: /s/ Clark Waddoups
Attorneys for Appellants
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Excerpts from Brief of Appellants to the Montana Supreme Court

III.

ASSUMING, ARGUENDO ONLY, THAT THE LOWER COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY ON EITHER OF COUNTS THREE OR FOUR, THE COURT NEVERTHELESS CLEARLY ERRED IN SUBMITTING THE QUESTION OF PUNITIVE DAMAGES TO THE JURY.

A. *At the Time the Plaintiff was Terminated this Court Had Not Yet Formulated either of the Legal Theories Set Forth in Counts Three and Four.*

The plaintiff's employment was terminated on April 15, 1980. At that time the only pronouncement that had been made by this Court to employers and employees in Montana with regard to the law of employment termination was, ". . . that in a proper case a cause for wrongful discharge (for violation of public policy) could be made out by an employee." (Dictum in *Keneally v. Orgain,* 186 Mont. 1, 606 P.2d 127, 130 (1980), a case decided January 30, 1980). *Gates* I, supra, in which this Court [found] that a covenant of good faith and fair dealing was implied in employment contracts, was not decided until January 5, 1982. And, as has been developed, *Crenshaw v. Bozeman Deaconess Hospital,* supra, where the Court recognized a cause of action sounding in negligence, was not decided until December 6, 1984.

With regard to Montana statutes, as opposed to appellate decisions, the only applicable statutes of which the defendants had notice were prohibiting discrimina-

tion under the Montana Human Rights Act, Title 49, Chapter Two, Montana Code Annotated. But the Montana legislature *specifically prohibited any order requiring the payment of any punitive damages.* Sec. 49-2-506 M.C.A.

Other than this, the only statute governing the employment relationship between PFS and the plaintiff was Section 39-2-503 M.C.A. which provided that PFS could terminate the plaintiffs' employment *at-will.*

Because of these facts and for the following reasons it is submitted that the lower court erred in submitting the question of punitive damages to the jury since PFS had no means by which it could appreciate that its conduct in terminating the plaintiff could in any sense be regarded as wrongful, let alone so wrongful as to justify the imposition of punitive damages.

B. *An Award of Punitive Damages Should Not Be permitted in this Case Because PFS Had No Notice that the Discharge Could be Regarded as Wrongful.*

Professor Mallor provides in her article, "Punitive Damages For Wrongful Discharge Of At Will Employees", supra, a scholarly and well-reasoned discussion of the propriety of awarding punitive damages in wrongful termination cases.

Her initial observation is that:

> The applicability of punitive damages has been at issue in a number of wrongful discharge cases, with predictably mixed results. No court has analyzed thoroughly the propriety of using a punitive remedy in wrongful discharge cases, although the conjunction of these two expanding areas of law warrants careful

analysis. The imposition of punitive damages in wrongful discharge cases could become a powerful force for deterring the abuse of managerial discretion, or it could result in undue chilling of business decision-making and lead to the retention of unproductive employees.

Id, at 452-53.

And her ultimate conclusion is that punitive damages can serve important societal goals in the appropriate wrongful discharge cases by limiting the abuse of superior power on the part of management:

> The development of rights of action for wrongfully discharged at will employees reflects the general trend toward increasing the accountability of those who possess power over the lives of others. Courts have recognized that some uses of the power of termination adversely affect important public policies and that at will employees lack the political and bargaining power to curb even the most flagrant abuses of the power of termination. Yet, the fragmentation that characterizes American employment law in general also pervades the expanding body of law regarding termination of at will employees. *The crazy-quilt of theories and approaches for recovery by at will employees signifies a war of policies in which the need to enlarge the power of unorganized workers is pitted against the need to conserve judicial resources and the need to retain business owners' ultimate control of the workplace. Courts have resolved this conflict by creating outer limits on the power of termination, in which only employees who have been victims of exceptional abuses are compensated.*
>
> An employer has little incentive to respect these newly created rights, however, when abusive discharge will result in isolated litigation by individuals who map recover only relatively small sums in compensa-

> tory damages. The use of punitive damages in appropriate wrongful discharge cases expresses society's disapproval of the exploitation of superior power and creates a strong incentive for employers to conform to newly created legal duties. As in other types of cases in which courts have imposed punitive damages to enforce society's expectations regarding the legitimate use of power, a remedy that provokes the attention of people in the boardroom and the personnel office is needed in wrongful discharge cases to halt abusive employment practices that threaten public and private interests. (Emphasis supplied.)

Id, at 495-96.

Before coming to this conclusion, however, Professor Mallor first analyzes that type of conduct on the part of the employer that would warrant the imposition of punitive damages:

> In defining the range of conduct that gives rise to an award of punitive damages in wrongful discharge cases, courts must balance the risks discussed above against the objectives of both the punitive remedy and the wrongful discharge action. *To avoid the risk of chilling legitimate personnel decisions, courts should limit punitive damages to cases in which the employer has some means of appreciating that his conduct is wrongful. Notice of the wrongfulness of a contemplated discharge could be supplied by a statute or decision outlawing discharge for a specified reason. Notice also could be found in commonly held moral or legal principles or in the appreciation of a clear and specific right held by the plaintiff that is established by law or contract.*
>
> *Where there is a reasonable doubt about the extent of the employee's right, courts should resolve these doubts in favor of the employer on the punitive damages issue.* For example, while employees may

have certain personal freedoms of speech and association, the extent of these rights are ill-defined. An employer who discharges an employee for objecting to a product or policy of the employer may be liable for compensatory damages if state law permits but should not be subjected to punitive damages. By contrast, an employer aware of a definite right or obligation on the part of the employee should be expected to appreciate the wrongfulness of interference with that right or duty. Thus, an employer who discharges an employee for refusing to commit a crime has notice, derived from general moral principles and common knowledge that all persons have the obligation not to violate the criminal law, that the discharge is wrongful. *The threshold inquiry should be, then, whether the employer had the means of appreciating that its conduct was wrongful. This test would exclude punitive damages in cases involving violations of personal rights that are not clearly established, such as most implied-in-fact contract cases and cases using the more attenuated definition of public policy, which occur without additional personal misconduct of the employer.*

Second, in view of the retributive aspect of punitive damages and the danger of exposure to excessive liability, courts should reserve the use of punitive damages for cases involving an element of outrage or aggravated misconduct. These courts could use the state-of-mind test to identify the type of aggravated misconduct warranting punishment, but should be mindful that outrage may also be present in conduct that offers an unjustifiable insult to the public interest. Two basic categories of cases can be identified in which courts could justifiably find that the employer's conduct was an extreme deviation from its obligation and, therefore, deserving of punishment. (Emphasis supplied.)

Id, at 492-93.

Professor Mallor then identifies the two categories of cases where the imposition of punitive damages against an employer might be warranted as those involving:

1. "Reprehensible behavior toward an individual employee"; and ,
2. "Outrageous conduct in relation to a strong public interest or a clear personal right."

Id, at 493.

When the Montana cases relating to punitive damages are analyzed in light of the above framework presented by Professor Mallor it is clear that this Court is in accord with the views she has expressed. Therefore, since PFS, at the time the plaintiff's employment was terminated, could have had no notice that its conduct could subsequently be regarded as wrongful and since no question of outrage was present, it is patent that the district court erred in submitting the question of punitive damages to the jury.

C. *This Court Has Announced That It Would Not, Except In Exceptional Circumstances Sanction The Sting Of Punitive Damages Where The Defendant Cou[l]d Have No Notice That Its Conduct Could Subsequently Be Regarded As Wrongful.*

This Court has emphasized that the concepts of elemental fairness would prohibit an award of punitive damages against an employer in wrongful termination cases where the employer could not know that its conduct could be regarded, at a much later date, as being wrongful. In *Gates II*, supra, this fundamental principle was acknowledged but a punitive damages award was allowed to stand, over a strong dissent authored by Justice Gulbrandson, where the evidence demonstrated that the employer en-

gaged in deceptive conduct towards the employee in securing her resignation for the purpose of sparing the employer liability for unemployment compensation benefits.[23]

> Respondent argues that it should not be liable for punitive damages for terminating appellant without warning because at the time of appellant's termination there was an absolute right to fire without any type of process. Respondent asserts that new legal rights were given to appellant in the first appeal of this case and that respondent could not have known of the duty it owed appellant at the time of her termination.
>
> Respondent is not being assessed punitive damages for failing to provide a warning prior to the firing. Rather respondent's conduct in obtaining the letter of resignation and refusing appellant's demand for return forms the basis for a jury finding of fraud, oppression or malice.
>
> An employe[r] stands to gain by an employee's resignation and such gain may be at the employee's expense. Resignation, rather than discharge, may protect an employer from immediately becoming liable for unemployment compensation benefits. Furthermore, the employer may, by obtaining a letter of resignation, be insulating itself from a claim of wrongful discharge.
>
> *The courts must vigilantly assure that employers, as well as employees are treated fairly. The sting of punitive damages will only be sanctioned where there is evidence that the tort feasor's conduct rose to a level of oppression, fraud or malice. Here we have a close case. However, when the evidence is viewed*

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[23] As contrasted to the facts of this case, where the plaintiff was unequivocally terminated for economic reasons but where her right to receive unemployment compensation benefits was unimpaired and where she also received six months severance pay. (TR., pp. 1027-28)

> *in a light most favorable to the employee, there is sufficient evidence for a jury to find that employer's conduct rose to the requisite level of culpability.* (Emphasis supplied)

Gates II, supra, 668, P.2d at 216

The Supreme Court of West Virginia agreed with this Court that conduct of the sort exhibited by the employer in *Gates II* was necessary before the recovery of punitive damages would be warranted. *Harless v. First National Bank in Fairmont*, 289 S.E.2d 692, 703 (W.Va. 1982).

But, however, since the plaintiff in *Harless* failed to establish the existence of such "wanton, willful or malicious conduct" an award of punitive damages was overturned. Id.

Professor Mallor contrasted the *Gates II* and *Harless* decisions as follows:

> "In *Harless v. First National Bank in Fairmont*, the Supreme Court of West Virginia held that an employee discharged because of his efforts to bring the employer into compliance with certain federal and state banking laws stated a cause of action. Following this decision, the trial court awarded the employee $62,500 in punitive damages. On appeal from the punitive damages award, the court held that punitive damages were not justified because the facts did not demonstrate willful, malicious, or wanton conduct. *The court held that punitive damages are appropriate if the employer circulated false rumors about the employee, engaged in concerted efforts of harrassment to induct the employee to resign, or actively interfered with the employee's efforts to find other employment. Conversely, in Gates the employer's deceptive conduct in inducing the employee to resign gave rise to punitive damages.*"
> (Emphasis supplied)

Mallor, supra, at 493-94

Both the concept of prior notice to the employer and the concept of active interference bp the employer with the employees ability to find other employment were before this Court in *Crenshaw,* supra. As contrasted to the facts of this case, where the termination in question occured on April 15, 1980, the employee in Crenshaw was discharged on March 12, 1982. *Crenshaw,* supra, 693 P.2d at 488. And *Gates I* was handed down by this Court on January 5, 1982. Therefore the *Crenshaw* employer had the opportunity to become aware that the doctrine of the implied covenant of good faith and fair dealing was applicable, as of that date, to employment relationships in Montana. For this reason the Court rejected the employers argument in *Crenshaw* that it was error to assess punitive damages against it for tortious conduct that was an unknown cause of action at the time of the discharge:

> "This Court recognized for the first time that the breach of an implied covenant of good faith and fair dealing was a tort for which punitive damages may be awarded. In Gates v Life of Montana (Mont. 1983), 668 P.2d 213, 40 St. Rep. 1287 we stated: "Breach of the duty owed to deal fairly and in good faith in the employment relationship is a tort for which punitive damages can be recovered if defendant's conduct is sufficiently culpable." The Hospital submits it was clear error to instruct the jury on punitive damages. Crenshaw was discharged on March 12, 1982. The Gates II decision was decided by this Court August 5, 1983. The Hospital advances it was error to assess punitive damages for tortious conduct that was an unknown cause of action at the time of plaintiff's discharge. We disagree. We *established the duty of good faith and fair dealing arising out of an employment agreement in Gates I. The Hospital*

> *was put on notice to deal in good faith at the time the alleged incident took place."*
> (Emphasis supplied)

Crenshaw, supra, 693 P.2d 495.

The Court further found that the employer's interference with the employee's ability to find other employment[24] nevertheless justified an award of punitive damages:

> "Crenshaw asserts the maliciousness of the Hospital's conduct stemmed from the Hospital removing the "arterial blood gas" certificate from her personnel file and fabricating charges against her. The record sustains that the Hospital failed to properly investigate the charges. *In a medical community such as Bozeman, charges of such a nature should not have been raised without careful consideration of the consequences to one's professional livelihood and reputation. This, we hold is the degree of culpability the Gates, decision was to prevent."*
> (Emphasis supplied)

Crenshaw, supra, at 496

On April 15, 1980, the employers and employees in Montana were living in the declining days of the true employment at will era. PFS, on that date, could have no way of knowing that a jury, over five years later, would be permitted to apply subsequently developed theories of law and rule that its termination of the plaintiff's employment was wrongful.

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[24] As contrasted with this case, where both Fred Ogolin and the plaintiff's immediate supervisor, Ron Triner, wrote letters of recommendation in her favor and tried to find other employment for her. (TR. pp. 1028-29, 1148)

PFS on that date was fighting for its economic survival. Its net income was and had been rapidly declining and it was forced to cut expenses. Through its policy of attrition and through its reduction in force it reduced employee-related expenses from 4.6 million dollars in 1980 to 3.5 million dollars in 1981, a savings of 1.1 million dollars.[25] The decisions it made at that time were not easy but they were necessary if PFS was to stay in business. And they were decisions made without the benefit of this Court's later holdings in the area of employment termination.

Yet, because a jury in 1985 was permitted to "second-guess" one of those decisions made in 1980 a verdict has now been returned against PFS in the amount of One Million Four Hundred Ninety-Four Thousand and no/100 Dollars ($1,494,170.00), 1.3 million of which was punitive damages. The punitive damage portion of the verdict alone totally wipes out the savings of 1.1 million dollars in employee-related expenses that was achieved with great difficulty in 1980.

As a matter of law, it is submitted that—at the very least—the punitive damages award was not justified and cannot be permitted to stand. PFS discharged an at-will employee for economic reasons. It had no notice that this termination could subsequently be regarded as wrongful. Further, even if it were to be assumed that PFS had such notice, its conduct in terminating the plaintiff was not, as a matter of law, so ". . . willful, wanton, and/or reckless (so as to) allow imposition of punitive damages on the

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[25] TR, p. 718; See note 6, supra, at page 14.

basis of presumed malice." *Owens v. Parker Drilling Co.*, —Mont—, 676, P.2d, 162, 164 (1984).

D. *Under the Recent Standards that have been Articulated by this Court with regard to Punitive Damages, It is Clear that was Error to Submit the Question of Punitive Damages to the Jury.*

The people who are engaged in business in Montana, from insurance companies and financial institutions down to small merchants, are the people who provide jobs to the citizens of Montana. These people need to be able to make necessary business decisions with a reasonable degree of certainty that such decisions will not submit them to the cost of future and extensive litigation, including the possibility of large damage awards. It is for this reason that lawyers in our society play a large and important role in advising clients of the probable legal consequences of their planned actions. Probably no lawyer in Montana who has practiced for any length of time has not been called upon by a businessman for advice as to what is legally permissible. Today, such

* * *

No. 85-380

IN THE SUPREME COURT OF
THE STATE OF MONTANA
1986

MILDRED FLANIGAN,

Plaintiff and Respondent,

vs.

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOC., a federally chartered banking corporation, and FRED OGOLIN,

Defendants and Appellants.

PETITION FOR REHEARING

COMES NOW, the Appellants, Prudential Federal Savings and Loan Association and Fred Ogolin, and, pursuant to Rule 34 of the Montana Rules of Appellate Procedure, petitions this Court for a rehearing of the decision that has been rendered by theh Supreme Court in this matter, for the following reasons:

1. The majority in stating at page 16 of the decision that the punitive damage statute, Section 27-1-221, M.C.A., gave notice to the appellants that their conduct could be subject to punitive damages, overlooked the following facts:

   a. The fact that the relationship between the parties was created by a Contract of Employment;

   b. The fact that Section 27-1-221, M.C.A. has, by its very terms, no application to actions arising out of a contract and thus a reading of the statute by any employer in 1980 could not have given any notice to that employer that the termination of an

employee could be considered to be conduct that would give rise to punitive damages;

c. The fact that, in 1980, it was the expressly announced policy of the Montana Legislature, set forth in Section 49-2-506, M.C.A., that punitive damages should not be awarded [in] employment termination cases.

2. The retrospective imposition of punitive damages under a new cause of action created by this Court in 1982 violates the rights of the Appellants under the Contract Clause of Article 1, Section 10 of the United States Constitution;

3. The retrospective imposition of punitive damages under a new cause of action violates the Appellants rights under the Due Process clause of the Fourteenth Amendment of the United States Constitution;

4. The Court has overlooked the fact that no question of fact had ever existed as to whether the Plaintiff was terminated as part of a reduction in force and, in overlooking this fact, has overlooked as well the important and decisive issue that was presented to this court with regard to the question of seniority.

This Petition for a rehearing is, to a significant extent, based upon the recent directive that has been given by the United States Supreme Court to state courts that punitive damage awards must be analyzed in terms of the Federal Constitutional rights of the Defendants:

> "Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, Section 10; that a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing

> punitive damage awards in Alabama violates the due process clause of the Fourteenth Amendment.
>
> * * *
>
> These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them."
>
> *Aetna Life Insurance Company vs. Lavoie*, 89 L.Ed. 2nd, 823, 837 (decided April 22, 1986)

In their motion for an extension of time in which file this petition for rehearing, the Appellants already called this Court's attention to this important decision. The appellee, in her Memorandum in Opposition for an Extension of Time, has already begun to argue that this Court should ignore this recent decision of the United States Supreme Court. The reasons advanced by the Plaintiff, who, of course wants to keep her very large punitive damage award, are that:

> 1. In considering the issues relating to the constitutional propriety of permitting a retrospective imposition of punitive damages under a new cause of action, this court would be considering a new issue; and
>
> 2. Despite the directive of the United States Supreme Court that "(t)hese arguments raise important issues which in an appropriate setting, must be resolved" the language of the United States Supreme Court is but "mere dicta" that can be ignored.

Accordingly, the Appellants, have prepared a separate memorandum of law accompanying this Petition for Rehearing which the Appellants submit should be carefully examined by this Court in view of the important Federal

Constitutional issues involved in this case by reason of this Court's affirming the punitive damages award.

DATED this 20th day of June, 1986.

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No. 85-390

IN THE SUPREME COURT OF
THE STATE OF MONTANA
1986

MILDRED FLANIGAN,

Plaintiff and Respondent,

vs.

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOC., a federally chartered banking corporation and FRED OGOLIN,

Defendants and Appellants.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

1. SUBSTANTIAL REASONS EXIST THAT CALL FOR THIS COURT'S CONSIDERATION OF THE FEDERAL CONSTITUTIONAL ISSUES ON THIS PETITION FOR REHEARING

Whi[l]e it is ordinarily true that even constitutional issues must be raised at the trial level, an examination of

the history of the appeal of *Aetna Life Insurance Company vs. Lavoie*, —U.S.—, 89 L.Ed.2d 823 (1986) establishes that the constitutional issues which are being drawn to the Court's attention on this Petition for Rehearing are of such importance that, if the Court continues to adhere to its holding that the Appellants had notice *in 1980* that the termination of the Plaintiff could at some time in the future result in punitive damages being imposed against them, then the Court should also meet and address the constitutional issues that are raised by this holding.

In *Aetna Life Insurance Company vs. Lavoie*, supra, the insurance company had refused to pay the full amount of the hospital bill incurred by the Lavoies. The Lavoies thereupon brought suit against Aetna Life Insurance Company (hereafter "*Aetna*"), seeking payment of the full amount of the hospital bill and also seeking punitive damages because of *Aetna's* alleged bad faith refusal to pay a valid claim. The jury at trial awarded compensatory damages in the amount of $1,650.22 and punitive damages in the amount of $3,500,000.00. The Alabama Supreme Court in a 5-to-4 decision written by a Justice Embry affirmed the award of punitive damages.

Following the decision of the Alabama Supreme Court, *Aetna* filed a timely application for rehearing. Before its application was ruled upon Aetna learned that Justice Embry, as a private citizen, had brought his own "bad faith" action against two other insurance companies because of these other companies' failure to pay a claim that he had submitted. Aetna thereupon moved the Alabama Supreme Court to have Justice Embry recuse himself from the case upon the grounds that he had a direct pecuniary interest in the appeal that had been filed by *Aetna* and

therefore was biased. This motion was denied by the Alabama Supreme Court and the appeal to the United States Supreme Court followed.

The United States Supreme Court, after reviewing Justice Embry's involvement in both the *Aetna* appeal and in his personal litigation, in which he sought punitive damages from his own insurers, concluded that Justice Embry had a direct, personal, substantial and pecuniary interest in the *Aetna* appeal.

The Court then concluded that Justice Embry's participation in the *Aetna* appeal violated Aetna's due process rights and mandated a reversal of the judgment of the Alabama Supreme Court. Id, page 835, 836.

The issue of whether *Aetna* was denied due process because of Justice Embry's refusal to recuse himself from consideration of the appeal was not presented until after the full decision of the Alabama court had been rendered. The following issues were also not presented for purposes of appellate consideration until the time of Aetna's Petition for Rehearing filed in the Alabama Supreme Court:

> 1. The issue of whether the retrospective imposition of punitive damages under a new cause of action violated Aetna's rights under the contract clause of Article I, Section 10;
>
> 2. The issue of whether a 3.5 million punitive damage award is permissible under the Excess of Fines Clause of the Eighth Amendment;
>
> 3. The issue of whether the lack of sufficient standards governing punitive damage awards in Alabama violated the due process clause of the Fourteenth Amendment;
>
> 4. The issue of whether Alabama Ala Code Section 12-22-72 (1975), under which any person who

> successfully appeals a money judgment is assessed ten percent penalty, is unconstitutional under the equal protection clause of the Fourteenth Amendment.

Accordingly, the Lavoies moved for the dismissal of Aetna's appeal to the United States Supreme Court on the grounds that *Aetna* had not previously raised all of the above issues. The Appellees supported this motion with a brief and the matter was considered by the United States Supreme Court on appeal. Attached to this memorandum is a copy of a reply memorandum that was filed with the United States Supreme Court, wherein *Aetna* responds to the LaVoy's (sic) motion to have the appeal dismissed because of Aetna's supposed failure to timely raise the issues. Of course, the United States Supreme Court did not dismiss the appeal on these grounds and instead, as has been developed, the Court reversed the Alabama Supreme Court because of the recusal-for-bias issue and stated with regard to the other issues that "(t)hese arguments raise important issues which in an appropriate setting, must be resolved." Id, 89 L.Ed.2d at 837. Thus, the history of the *Aetna* case on appeal establishes that appellate courts should take the opportunity to resolve important constitutional issues even though the issues might have been presented at an earlier time.

This is a principle that has also been acknowledged by this court in a decision where it extensively quotes from Justice Marshall's decision in Marbury vs. Madison:

> All officers of this State, including judicial officers, are by constitutional mandate required to take an oath that they "will support, protect and defend the constitution of the United States and the constitution of the state of Montana." Section

> 1, art. 19. In the case of Marbury v. Madison, 1 Cranch 137, 179, 2 L.Ed. 60, Chief Justice Marshall, after reviewing various provisions of the Federal Constitution, said: "From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! * * * Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime." In that case the constitutional question was raised by the court itself on behalf of one who never appeared before the court, and it did not have the benefit of the advice or briefs of counsel. 9 A.B.A.J. 109. Here we have raised the question, but we invited counsel to file briefs and they have accepted our invitation. *The constitutional question is decisive on the appeal of the State. If we declined to decide [this] question, we would be avoiding the performance of a duty. If the act of 1935 is in fact unconstitutional, to decline to so declare would be a violation of our oaths of office. Therefore, the question must be decided.*
>
> In Re Clarks Estate, 105 Mont. 401, 74 P.2d 401, 406 (1937). (Emphasis Added)

And while the general rule in this court is still that constitutional issues must be raised that the trial level or

at the earliest opportunity, the *Clark* case has never been overruled but has only been distinguished:

> "Lewis cites In re Clark's Estate, 105 Mont. 401, 74 P.2d 401, as authority for the proposition that constitutional issues may, under certain circumstances, be raised for the first time on appeal. In Clark the Court specifically invited the parties to raise the parteiular constitutional question involved, and in that context created the exception. That exception is clearly not applicable to the instant case, where no such invitation was extended."
>
> Lewis v. Anaconda Company, 168 Mont. 463, 543 P.2d 1339, 1342 (1975).

Finally, the Appellants have extensively developed both in this court and below their position that they should not be held accountable for punitive damages because they could have no notice *in 1980* that this court would subsequently develop a new cause of action and set new standards that would be applied to their actions in 1980, when such actions were entirely within the scope of both the statutory and judicial law as it then existed. The Plaintiff at no time offered anything of any substance in opposition to this argument of the Appellants. The Plaintiff did not even try to argue that the mere existence of the punitive damage statute, Section 27-1-221 M.C.A., which by its very terms was not and is not applicable to the actions arising out of the contract, could be construed to give notice to the Appellants that their conduct could be subject to punitive damages. The Appellants argue below that the court must have been mistaken in announcing that the punitive damage statute could therefore be considered as giving notice to Appellants that their actions in terminating an employment contract could give rise

to punitive damages. But, if the court was not mistaken, and if it intends that this novel interpretation be given full effect, then it was not until June 5, 1986 when the courts decision was rendered, that it can be said that the Appellants rights under the Contract Clause of Article I, Section 10 and under the Due Process Clause of the Fourteenth Amendment had been violated. Thus, if the court intends to adhere to its statement that Section 27-1-221 M.C.A. is sufficient to give the Appellants notice that punitive damages might be imposed, then it is respectfully submitted that the court must grant the Petition for Rehearing to consider these important Federal Constitutional issues that have been set forth by the United States Supreme Court.

SECTION 27-1-221, M.C.A. CANNOT IN ANY SENSE BE SAID TO HAVE GIVEN ANY NOTICE TO THE APPELLANTS THAT THEIR CONDUCT OR THEIR ACTIONS IN TERMINATING THE PLAINTIFF'S EMPLOYMENT COULD GIVE RISE TO PUNITIVE DAMAGES

The relationship that was established between the Plaintiff and between PFS was a relationship that was based upon and which grew out of an *employment contract.* PFS hired the Plaintiff to perform certain services. The Plaintiff performed those services and was paid by PFS for performing them. It was a valid *contract* of employment supported by consideration on both sides.

Thus if PFS or any employer were to have, in 1980, examined the statutes of Montana to determine whether the terimnation of the employment contract could give rise to punitive damages, the first place such employer might have looked would have been Section 27-221, M.C.A. which

by its express terms provided that punitive damages were not available in actions arising out of contract:

> "*In any action for a breach of an obligation not arising from contract* where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant." (Emphasis added.)

If the employer in 1980 wanted to confirm that in fact a contract of employment in fact was a contract, then it could have further examined the applicable Montana Statutes and found in Section 39-2-101 M.C.A. the following definition:

> "The contract of employment is a contract by which one, who is called the employer engages another, who is called the employee, to do something for the benefit of the employer or a third person."

As this point, a perusal by the employer could cease. The only answer that could have been drawn from the above two statutes was that punitive damages were not recoverable as a result of the action of an employer in terminating a contract of employment, whether it be the contract of an at-will employee or the contract of an employee who is actually hired for a specific term.

But if the employer had desired to carry its research a bit further, it could have determined that the legislature had acted to regulate the contract of employment with its adoption of the Montana Human Rights Act, Section 49-2-101 et seq. This further examination would have revealed that if the termination of employment was the result of a prohibited discriminatory activity, then the employer could be required to "rectify any harm, pecuniary

or otherwise, to a person discriminated against." Section 49-2-506(1)(b). *But, the employer could not be held liable for "the payment of any punitive damages."!* Section 49-2-506(2).

Therefore, it is respectfully submitted that the court must have been mistaken in concluding that the punitive damage statute, Section 27-1-221, M.C.A. could have given the Appellants any notice that their act in terminating the employment of the Plaintiff could subject them to punitive damages.

THE RETROSPECTIVE IMPOSITION OF PUNITIVE DAMAGES UPON THE APPELLANTS UNDER CAUSES OF ACTION THAT WERE NOT DEVELOPED UNTIL YEARS AFTER THE TERMINATION OF THE PLAINTIFF VIOLATES THE RIGHTS OF THE APPELLANT UNDER THE CONTRACT CLAUSE OF ARTICLE I, SECTION 10.

This has been developed, it cannot be questioned that the relationship between the Plaintiff and PFS in 1980 was one that arose out of and was covered by the contract of employment. The expectations of the parties to the contract were governed by their understanding as to hours of work and duties, wages and benefits, etc., and by the applicable Montana Statutes that have been discussed in part II above.

The Contract Clause of the United States Constitution forbids precisely the action taken by this Court in affirming the punitive damage award. It was a retrospective imposition of liability that disrupted expectations based on a contract, imposed a harsh burden on a contracting party, and which served no substantial state in-

terest. Article I, Section 10, Clause One of the constitution provides in part:

> "No state shall . . . pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts. . ."

It is not the purpose of the Petition for Rehearing to fully develop this issue at this time. It is the purpose of this Petition to call the Courts attention to the fact that its action in retrospectively imposing punitive damages upon the Appellants under a new cause of action is or may be in conflict with the Contracts Clause of the United States Constitution. The statement of the United States Supreme Court in *Aetna*, supra, that this is an important issue "which in an appropriate setting must be resolved" is, it is submitted, enough of a reason for this court to call for additional briefs and arguments upon this issue.

However, the Appellants will briefly note some of points and issues in this regard that it would seek to develop more fully in the event that this petition is granted. There is no question but that the retrospective imposition of punitive damages under causes of action developed years after the termination of the Plaintiff's employment contract drastically impairs the obligations flowing from that contract. And with regard to state actions which impair contracts the United States Supreme Court has noted:

> 1. When, as here, "the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate purpose behind the regulation."
>
> (Energy Reserves Group, Inc. vs. Kansas Power and Light Co., 459 U.S. 400, 411 (1983))

> 2. Specifically, the State must show that the impairment was both "reasonable and necessary to serve an important public purpose."
>
> (United States Trust Company vs. New Jersey, 431 U.S. 1, 25 (1977))
>
> 3. The question whether a measure is "reasonable and necessary" can be resolved only by inquiring into whether the impairment was carefully tailored to serve the State's interest (See United States Trust Company, 431 U.S. at 29-30) and into whether a "less . . . drastic impairment"—that is, a "more moderate course"—would "serve this state's" purposes equally well[.] (Id. at 30-31).

Finally under the above standards it is patent that this Court's retrospective imposition of punitive damages upon the Appellants is constitutionally impermissible. It can serve no discernible state interest whatever. And it should be expressly noted that while the United States Supreme Court has commented that "the elimination of unforeseen windfall benefits 'may be' a reasonable basis" for attending a contractual obligation (*United States Trust Company* at 31, n.30 citing, inter alia, *Gelfert vs. National City Bank*, 313 U.S. 2211, 223-235 (1941)); here, this Court has altered a contractual obligation in order to *confer* a windfall benefit on a party.

This Court's actions in creating new causes of action in establishing new standard that cover the employment relationship are actions that are essentially legislative in character (not unlike the Montana legislature's actions in adopting the Human Rights Act) and the retrospective imposition of punitive damages under the new causes of action as thus the type of action that is prohibited by the Contract Clause; thus, *Title Oil Company*

v. Flanigan, 263 U.S. 444 (1924) should not bar inquiry into this matter.

THE RETROSPECTIVE IMPOSITION OF PUNITIVE DAMAGES UNDER A NEW CAUSE OF ACTION VIOLATES THE APPELLANTS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Again, the Appellants are seeking permission to fully develop this issue in the brief that it will file if the Court would grant their Petition for Rehearing. But, as it is impossible to contend that punitive damages were not retrospectively imposed upon the Appellants under causes of action that would be developed years after the plaintiff's termination, the Appellants note that it is obvious that their rights of Due Process were violated:

> 1. "Retroactive (measures) . . . have to meet a burden not faced by (measures) that ha(ve) only future effects."
>
> (Pension Benefit Guaranty Corp. v. R. A. Gray and Co., — U.S. —, 104 S.Ct. 2709, 2718 (1984))
>
> 2. A retroactive measure must be "supported by a legitimate (state) purpose furthered by rational means." (Id.)
>
> 3. A state must provide an independent "justification for the retrospective imposition of liability." (Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976))
>
> 4. "The retroactive aspects of (a measure), as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." (Ibid.)
>
> 5. A retrospective imposition of civil liability will violate the due process clause if it is "partic-

ularly 'harsh and oppressive' ". (U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17, n.13 (1977))

6. The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. (Brinkerhoff-Faris Trust Co. vs. Hill, 281 U.S. 673, 680 (1930))

7. In closely related areas the United States Supreme Court has, on several occasions, held that the due process clause is violated by a judicial decision to impose liability for conduct that could not reasonably have been considered wrongful at the time it occurred. (Bouie vs. City of Columbia, 378 U.S. 347 (1964))

THE COURT HAS OVERLOOKED THE FACT THAT NO QUESTION OF FACT HAD EVER EXISTED THAT THE PLAINTIFF WAS TERMINATED AS PART OF A REDUCTION IN FORCE AND, IN OVERLOOKING THIS UNDISPUTED FACT, HAS THEREBY OVERLOOKED AS WELL THE IMPORTANT AND DECISIVE ISSUE THAT WAS PRESENTED TO THIS COURT WITH REGARD TO THE QUESTION OF SENIORITY.

The majority states that page 8 of the decision that:

> A long-term employee has an expectation of continued employment provided that the employee's work performance is satisfactory—*Dare vs. Montana Petroleum Marketing Co.*, (Mont. 1984), 687 P.2d 1015, 1020, 41 St.Rep. 1735, 1740. Of course, this does not foreclose an employer from engaging in legitimate reductions in force necessary to maintain the economic vitality of the company. However, there is evidence in this record, from the lips of Ogolin himself, that respondent was fired for poor work performance. The jury

> could have relied upon this latter testimony and therefore concluded there was no reduction in force.
>
> The standard for ascertaining whether factual issues exist in a wrongful discharge case were articulated by the majority opinion in *Dare*, supra. We there said: [sic]

At the very least, it is submitted that this statement by the Court will give no guidance to employers in Montana who in the future may be forced, because of economic reasons, to institute a reduction in force. Will it be acceptable to include an employee in a reduction in force only if no other reason exists for terminating the employee?

If the purpose of the reduction in force is to insure the continued economic vitality of the company, should not the employer discharge the poor performers and keep the good performers?

Of course, the Plaintiff was a poor performer at the time of her termination. This fact was not diputed by her. The basic thrust of her arguments at both the trial level and at the appellate level was that she should have been given an opportunity to become a good performer.

However, all of this is meaningless in view of the fact that no question of fact ever existed as to whether or not a reduction actually took place. This was conceded by the Plaintiff before the presentation of evidence at the trial:

> The following acts were in violation of the covenant of good faith and fair dealing owed to the Plaintiff by the Defendants in the employment relationship:
>
> (1) The selection of the Plaintiff for terimnation of employment in a reduction in force on the basis of

her age, job tenure and longevity, seniority, and the employment benefits accruing therefrom;

* * *

(3) The inclusion of the Plaintiff in a reduction in force contrary to written assurances by the Defendant that employees with good performance ratings would not suffer the loss of their job due to business conditions;

* * *

(5) The selection of the Plaintiff for inclusion in the reduction in force on an abritrary and capricious basis, and without regard to any established criteria or uniform guidelines, and in the total absence of such criteria or guidelines;

* * *

(7) The selection of the Plaintiff for inclusion in the reduction in force contrary to her right of reasonable expectation of continued employment based upon her satisfactory job performance and there being no good cause for her termination;

(8) The failure and refusal of the Defendant, in evaluation of the Plaintiff's job skills and abilities, to consider the facts that Plaintiff had fourteen (14) years experience as a teller, plus an additional fourteen (14) years in various other aspects of the bank's operations. plus her retraining as a teller, which facts, if considered properly by the Defendant, would have reasonably warranted the conclusion that Plaintiffs should be continued in her employment; and

(9) The layoff of the Plaintiff and the subsequent attempt to rehire her but only if she gave up all of the fringe benefits which her twenty-eight (28) years of longevity had secured for her during her previous tenure.

Evidence conceding the fact of the reduction in force is presented by the Plaintiff at trial through her expert

witnesses, now Kanuth (TR., pp. 504-507, pp. 509-510, p. 560) and Brown TR., p. 760, p. 779, pp. 811-12).

And the fact that a reduction in force was conceded and was argued to the jury in the final judgment of plaintiff's counsel:

> (6) Failure to consider other employees (Connie Selon, Fran Tregidga, etc.) for termination.
>
> (7) Failure to establish any objective criteria for selecting employees for termination.
>
> (8) Failure to consider "seniority" and "past performance".
>
> (9) Failure to notify employees of change from ATTRITION to RIF POLICY (St. Patrick's Day Massacre).
>
> Appendix "A" to the reply brief.

Therefore, it is clear that the Court has overlooked the very important and decisive fact that a reduction in force had actually taken place and was taking place during the time of the Plaintiff's termination. No question of fact existed as to the fact of the reduction in force. The jury could not conclude there was no reduction in force.

And in overlooking this important fact, the court therefore either overlooked or felt it did not need to consider the very important and decisive issue of whether PFS had an obligation to utilize seniority criteria in engaging in a reduction in force. This important and decisive issue was pressed by the Plaintiff in the court below and was extensively argued and briefed to this Court. It is an issue that the Appellants respectfully submit was not considered by this Court but one that should be decisive in this case on appeal.

CONCLUSION

For the above reasons, the Appellants respectfully request the Court to grant their Petition for Rehearing.

DATED this 20th day of June, 1986.

DUNLAP & CAUGHLAN

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No. 86-612

FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN,

Appellants,

v.

MILDRED FLANIGAN,

Appellee.

On Appeal from the Supreme Court of Montana

MOTION TO DISMISS

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No. 86-612

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN,

Appellants,

v.

MILDRED FLANIGAN,

Appellee.

On Appeal from the Supreme Court of Montana

MOTION TO DISMISS

Appellee moves the Court, pursuant to Rule 16(1)(b), Sup. Ct. R., to dismiss Appellants' appeal, on the grounds that (i) Appellants failed to timely or properly raise a federal constitutional issue in

the state courts below and (ii) because there is no present case or controversy to be decided by this Court by virtue of Appellants' voluntary payment of the monetary judgment from which this appeal is taken.

———————o———————

STATEMENT

On September 25, 1986, (then) Justice Rehnquist denied Appellants' application for a writ of injunction that would have undone the voluntary payment by Appellants (hereafter "Prudential") of the punitive damages portion of the judgment which was affirmed below. Justice Rehnquist's in-chambers opinion denying the application was not grounded on Prudential's failure to meet the standards for such an injunction. Rather, it went to the heart of this Court's jurisdiction over any aspect of the appeal:

> The constitutional issues addressed in the application were not properly presented to the Montana Supreme Court until the petitioners filed for rehearing. The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation. (Citations omitted.) Under these circumstances, the claims presented by the petitioners are not properly before me. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ." Radio Station WOW v. Johnson, Inc., 326 U.S. 120, 128 (1945).

Denied.

Prudential Federal Savings & Loan Assn., et al. v. Flanigan, ____ U.S. ____, 107 S.Ct. 38 (Rehnquist, Circuit Justice, Sept. 25, 1986). Appendix (hereafter "App.") 1. Yet, Prudential persists in burdening this Court with another request to accept jurisdiction over this appeal.

At no time did Prudential raise a federal issue below, either in its pleadings, briefs, or arguments in the state district court, or in its three briefs filed on appeal to the Montana Supreme Court, or during oral argument to the Montana Supreme Court. The federal issues were raised for the first time in a Petition for Rehearing to that court.

Moreover, while the case was pending there, Prudential entered into an Escrow Agreement which was substituted, at Prudential's request, for the required surety bond pending appeal. App. 2. That agreement provided, inter alia, that in the event the judgment was affirmed, Flanigan had "the right to immediately demand and receive after remittitur the delivery of the [escrowed] securities" up to the amount of the final judgment. App. at 5 (emphasis added). The agreement also

incorporated an Assignment by which Prudential agreed that if the state district court judgment was affirmed "on appeal by the Montana Supreme Court," Prudential thereby assigned and transferred to Flanigan the securities held in escrow. App. at 13 (emphasis added).

Following denial of the Petition for Rehearing, without comment, by the Montana Supreme Court, Prudential voluntarily paid the entire amount of the judgment, interest, and costs, pursuant to the terms of the Escrow Agreement. As a result, Flanigan filed a Satisfaction of Judgment in the state district court.

———o———

ARGUMENT

I. THE APPELLANTS FAILED TO TIMELY AND PROPERLY RAISE OR LITIGATE FEDERAL CONSTITUTIONAL ISSUES IN THE MONTANA COURTS.

It is well established by judicial decisions in Montana, as in most juris-

dictions, that "a constitutional issue is waived if not presented at the earliest opportunity." Dodd v. City of East Helena, 180 Mont. 518, 591 P.2d 241, 244 (1979); Johnson v. Doran, 167 Mont. 486, 540 P.2d 306, 311 (1975). Notwithstanding this firm rule, Prudential first raised federal constitutional issues in its Petition for Rehearing after the Montana Supreme Court had affirmed the trial court. The Montana Supreme Court's decision was predicated strictly upon state law issues. 1/ Under Montana law, a petition for rehearing may not be filed to present, for the first time, constitutional issues not previously raised. Rule 34, Mont. R. App. Civ. Pro.; Femling v. Montana State University, ____ Mont. ____, 713 P.2d 996 (1986).

1/ Flanigan v. Prudential, ____ Mont. ____, 720 P.2d 257 (1986).

Furthermore, Prudential's repeated assertion that it raised the Eighth Amendment "excessive fines" issue in its Petition for Rehearing is a gross misrepresentation. That issue, which now appears to be the focal point of Prudential's appeal, was not asserted or briefed at all before the Montana Supreme Court, even in the Petition for Rehearing. See Juris. Statement, App. 44-63. The Eighth Amendment issue has been raised for the first time here.2/

Prudential argues that it "implicitly raised" a "due process" issue in the Montana Supreme Court. In its brief there,

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2/ Prudential also failed to challenge, at any time, the alleged "excessiveness" of the jury award on the traditional grounds allowed by Montana statute. Flanigan v. Prudential, ____ Mont. ____, 720 P.2d 257, 265 (1986).

however, Prudential made absolutely no mention of any federal or state constitutional provision. Id. at 32-43. Indeed, even signal words, such as "due process," "unfair," "fundamental fairness," or similar language that would suggest a federal constitutional "due process" issue, are conspicuously absent. Even if the words "due process" had appeared, this Court has held that mere reference to a denial of "due process of law," which could refer to either a federal or state constitutional provision, will be assumed to refer to the due process clause, if there is one (as there is in Montana) of the state constitution. See Mont. Const. art. II, § 17 (1972). In such an instance this Court will not assume jurisdiction. Bowie v. Scott, 233 U.S. 657, 665 (1914).

Prudential's "notice" argument was raised and responded to by the Montana

Supreme Court, only within the context of state statutes (punitive damages and employment at-will), not as to any state or federal constitutional provisions. Flanigan, ____ Mont. at ____, 720 P.2d at 265. Mere generalizations that might pertain to a potential federal issue are not sufficient to invoke the jurisdiction of this Court. Beck v. Washington, 369 U.S. 541 (1962).3/

Prudential offered not one shred of evidence in the lower courts to support

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3/ Even if, arguendo, a federal issue was "implicitly" raised challenging the validity of a state statute, Prudential failed to comply with Rule 38, Mont. R. App. Civ. Pro., requiring the State's Attorney General to be given notice of a constitutional challenge to a state statute. Because of this critical procedural omission, the constitutional issue, even if so raised, is yet another reason why it could not, and would not, be considered by the Montana courts. Bradbrook v. Billings, 174 Mont. 27, 568 P.2d 527 (1977); Gilbert v. Gilbert, 166 Mont. 312, 533 P.2d 1079 (1975).

the "notice" argument which it belatedly attempts to expand and present as a federal issue. There has been no ruling or comment in the lower courts, concerning a "notice" claim within the context of a federal issue, which would justify this Court's review of a state punitive damages statute that has existed since 1895. See, McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435 (1940).

Prudential totally fails to meet its burden of affirmatively showing that it properly invoked the jurisdiction of this Court. Memphis Natural Gas Company v. Beeler, 315 U.S. 649, 651 (1941). It is well established that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts.

Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974). Likewise, this Court has said it will decline to exercise jurisdiction when, as here, the highest state court was completely silent on the federal question. Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 309 (1903). A federal issue comes too late for consideration by this Court when first raised in a petition for rehearing and when, as here, state law requires that constitutional issues be raised prior to such a petition, and the petition has been denied without comment or opinion. Stembridge v. Georgia, 343 U.S. 541, 547 (1951); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945).

Prudential's claim that it "implicitly" preserved federal constitutional issues in the Montana courts is belied by its own agreement that this litigation,

involving solely traditional state tort and evidentiary issues, would conclude with payment of the judgment following affirmance by the Montana Supreme Court. This appeal is pursued simply as an afterthought because this Court indicated in Aetna v. Lavoie, ____ U.S. ____, 106 S.Ct. 1580, 1589 (1986), that the issues Prudential failed to timely raise below in this case might be considered "in an appropriate case."

The Aetna decision has been widely publicized among the tort defense bar.[4/] There is a plethora of tort cases involving punitive damages presently pending in both state and federal courts. In those

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4/ See, e.g., Feature Article, Aetna Life Insurance Co. v. Lavoie: Does Bad Faith Law Raise Questions of Constitutional Dimension?, Insurance Litigation Reporter 2 (Oct. 1985-Feb. 1986).

cases, Eighth and Fourteenth Amendment issues, and other federal issues, are being timely and properly raised in the pleadings and litigated throughout the trial and appellate levels. This Court, therefore, will not lack the opportunity, if it chooses, to review and pass upon those constitutional issues, mentioned in Aetna, which have been properly and timely raised, litigated and passed upon below.[5/] Because Prudential failed to timely or properly raise and litigate these issues, they were not addressed in the lower courts. Therefore, this case is far from

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5/ See, e.g., Rawson v. Sears Roebuck & Co., 615 F.Supp. 1546 (D. C. Colo. 1985), appeal docketed, No. 85-1223, argued Sept. 9, 1986 (10th Cir. 1986). ($10.0 million punitive damages and $5.8 million compensatory damages awarded for wrongful termination of employment, challenged, inter alia, on Eighth Amendment grounds.)

being the "appropriate case" for giving consideration to those issues.

II. NO CASE OR CONTROVERSY EXISTS BECAUSE PRUDENTIAL'S VOLUNTARY PAYMENT OF THE STATE COURT JUDGMENT RENDERS THIS APPEAL MOOT.

In Montana, a litigant who voluntarily pays and satisfies a judgment is precluded from taking a further appeal. Gallatin Trust and Savings Bank v. Henke, 154 Mont. 170, 461 P.2d 448 (1969). Therefore, even if the Escrow Agreement, which provided for payment of the judgment after affirmance "by the Montana Supreme Court," were construed to allow Prudential the right to a further appeal, its voluntary satisfaction of Flanigan's judgment following the decision of the Montana Supreme Court rendered this case moot. See, Heitmuller v. Stokes, 256 U.S. 359, 362 (1921). This Court will not render advisory opinions when a controversy has become moot by virtue of intervening fac-

tual circumstances. DeFunis v. Odegaard, 416 U.S. 312 (1974). An appeal will be dismissed as moot if events occur which prevent the appellate court from granting any effective relief. Mills v. Green, 159 U.S. 651 (1895). A case that has been rendered moot will not be decided even if it presents an issue of "public importance." Amalgamated Ass'n of Street Employees Div. v. Wisconsin Emp. Rel. Bd., 340 U.S. 416 (1951).

———————o———————

CONCLUSION

This Court is urged to adhere to its long-standing precedent establishing the firm rule, as reiterated and reaffirmed by Chief Justice Rehnquist in his in-chambers decision in this case, that constitutional issues first presented to the highest state court on a petition for rehearing,

and not addressed by that court, come too late for consideration by this Court. For that reason, as well as for the reason that this case is now moot, the Appellee moves that this appeal be dismissed.

DATED this 10th day of November, 1986.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-229

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL. *v.* MILDRED FLANIGAN

ON APPLICATION FOR INJUNCTION

[September 25, 1986]

JUSTICE REHNQUIST, Circuit Justice.

The application for a writ of injunction pending appeal is denied. The constitutional issues addressed in the application were not properly presented to the Montana Supreme Court until the petitioners filed for rehearing. The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation. See *Femling* v. *Montana State University*, —— Mont. ——, 713 P. 2d 996, 999 (1986); *Dodd* v. *East Helena*, 180 Mont. 518, 523, 591 P. 2d 241, 244 (1979). Under these circumstances, the claims presented by the petitioners are not properly before me. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ." *Radio Station WOW* v. *Johnson, Inc.*, 326 U. S. 120, 128 (1945).

Denied.

BEST AVAILABLE COPY

ESCROW AGREEMENT

THIS AGREEMENT, made and executed this 28th day of June, 1985, by and between PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a federal corporation, and FRED OGOLIN, (hereinafter called PFS), MILDRED FLANIGAN, of Butte, Montana, (hereinafter called Flanigan), and FIRST BANK BUTTE, Butte, Montana, a national banking corporation, (hereinafter called First Bank),

W I T N E S S E T H:

WHEREAS, there is pending in the Second Judicial District Court of the State of Montana in Cause No. 83-C-174 an action by Flanigan as Plaintiff against PFS, and

WHEREAS, Flanigan has recovered judgment against PFS in the sum of $1,494,170.00 entered on April 29, 1985, and

WHEREAS, on May 2, 1985, PFS filed a Notice of Appeal of said judgment to the

Montana Supreme Court and said appeal is now pending, and

WHEREAS, on May 22, 1985, the District Court entered its order directing the PFS (including Ogolin) to post a supersedeas bond with the Court in the sum of $1,645,000.00, a copy of which order is attached hereto, and

WHEREAS, PFS and Flanigan have agreed that PFS may satisfy the bond conditions of the order of May 22, 1985, by placing with First Bank as escrow holder the securities listed in Schedule "A" attached hereto, upon the terms and conditions of this agreement,

NOW, THEREFORE, it is agreed between the parties as follows:

1. PFS hereby deposits with First Bank as escrow agent securities listed in Schedule "A" attached hereto;

2. Flanigan agrees said deposit satisfies the conditions of the order of the District Court of May 22, 1985, attached hereto;

3. First Bank shall retain said securities as escrow agent pending appeal of Cause No. 83-C-174 and final determination thereof;

4. PFS has deposited with First Bank a separate assignment of its right, title and interest in said securities, conditioned nevertheless, on affirmance by the Montana Supreme Court of Flanigan's judgment against PFS in Cause 83-C-174, and if said judgment is reversed, the assignment shall be void;

5. The escrow agent First Bank shall hold said Securities without liability to First Bank except for the faithful performance of its duties as escrow agent;

6. PFS shall at all times pending appeal be the owner of said securities and entitled to all earnings on said securities. At the maturity of said securities, and in the event the appeal of Cause 83-C-174 is not final, PFS may upon notice by motion to the court and court's approval, replace said securities with other suitable securities;

7. In the event the judgment in Cause No. 83-C-174 is affirmed upon appeal, Flanigan shall have the right to immediately demand and receive after remittitur the delivery of the securities by First Bank up to the amount of final judgment and in the further event said judgment in Cause No. 83-C-174 is reversed and vacated, PFS shall have the right to immediately demand and receive upon remittitur from First Bank the securities listed in Schedule "A";

8. All notices of demand to First Bank by either PFS or Flanigan shall be in writing and acknowledged by First Bank;

9. Except for the faithful performance of its duties as escrow holder, First Bank (A) need not inquire into and shall not be responsible for the sufficiency of the securities, nor have any duty to investigate or inquire into the sufficiency or validity of the securities listed in Schedule "A"; (B) shall not be obligated to take any action which, in the opinion of its counsel, may unlawfully or unduly expose First Bank to the risk of liability as to said securities; (C) shall not be answerable or accountable for any act or failure to act under any circumstances with respect to the sufficiency or validity of the securities listed in Schedule "A"; (D) shall be under no duty or responsibility to act with regard to

any matter in Cause No. 83-C-174, or the appeal of said cause; (E) shall be entitled to be reimbursed for any costs or expenses arising out of this escrow and any dispute thereof, including reasonable attorney fees and costs; (F) shall not be liable or responsible for any transfer or assignment of the rights of any party to this agreement; and (G) shall be liable as a depository only and not be obligated to take any action required of any other party to this agreement.

10. PFS shall pay as court costs all escrow fees due under this agreement.

11. Time is of the essence of this agreement. This agreement constitutes the full agreement between the parties and no other agreement whether oral or written shall be deemed to exist or be binding upon the parties hereto.

12. This agreement shall not be assigned by PFS or Flanigan, without express written consent of the other party.

IN WITNESS WHEREOF, the parties have hereunto executed this agreement the day and year first above written.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION and FRED OGOLIN

By /s/ Fred Ogolin

/s/ Mildred M. Flanigan
MILDRED FLANIGAN

FIRST BANK BUTTE

By /s/ Don Tatge, V.P.

IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT

Of the State of Montana

In and for the County of Silver Bow

MILDRED FLANIGAN,

Plaintiff,

-vs- No. 83-C-174

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered banking corporation, and FRED OGOLIN,

Defendants.

ORDER

The Plaintiff's Exception to Sufficiency of Surety having come on regularly for hearing before the Court on the 10th day of May, 1985, the Plaintiff being represented by Donald C. Robinson, Esq., and the Defendants by Deirdre Caughlan, Esq. The parties having presented arguments on the issue presented by the Plaintiff's

objection, and the Court being fully advised in the premises, finds that the Plaintiff's objection to the sufficiency of the surety is well taken; the Court finds that in the event the Plaintiffs are successful after disposition of the appeal the total judgment, including interest, and costs, could be in the approximate amount of One Million Six Hundred Forty-five Thousand ($1,645,000.00) Dollars; it further appears that the judgment is not otherwise secured and the Court concludes that under Rule 7, Montana Rules of Appellate Civil Procedure, it is required that the supersedeas bond in this case must be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs, interest, and damages for delay the Court in its discretion finds and concludes that only a surety body will provide the proper and

adequate security to the Plaintiff herein, now, therefore, it is hereby

ORDERED, AND THIS DOES ORDER, that by no later than the 31st day of May, 1985, the Defendants will post a supersedeas bond with the Court, in the amount of One Million Six Hundred Forty-five Thousand ($1,645,000.00) Dollars, as a condition to satisfaction of Plaintiff's objections under the Montana Rules of Appellate Civil Procedure.

DATED this 22nd day of May, 1985.

/s/ Mark P. Sullivan
District Judge

SCHEDULE "A"

The following securities are held by First Bank Butte as Escrow Agent for Prudential Federal Savings & Loan Association and Mildred Flanigan:

U.S. Treasury Notes totaling $2,000,000 paying 10.50% interest and due to mature November 30, 1985. These Treasury Notes are held in First Bank Butte's general account at Federal Reserve Bank, Minneapolis, Minnesota.

Demand for withdrawal by either of the two mentioned parties must be made to First Bank Butte before 9:30 a.m. on the day transfer of funds is required and must be made in accordance with their escrow agreement. Disbursement shall be a First Bank Butte money order or cashiers check payable to Mildred Flanigan or, if demand is made by Prudential Federal Savings & Loan Association, a reverse transaction shall be made to their account at the Federal Reserve Bank, New York.

ASSIGNMENT

FOR VALUABLE CONSIDERATION, and upon the express condition that the judgment in Cause No. 83-C-174, filed in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, entitled "MILDRED FLANIGAN, Plaintiff, vs. PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN, Defendants," is affirmed, in whole or in part, on appeal by the Montana Supreme Court, Prudential Federal Savings and Loan Association does hereby assign, set over and transfer to Mildred Flanigan, all securities to the amount of final judgment, including interest at the rate of ten (10%) percent per annum and costs, held in escrow by the First Bank Butte under Escrow Agreement dated June 28, 1985, to which reference is hereby made, provided,

nevertheless, this assignment is void in the event the above-described judgment is reversed by the Montana Supreme Court and by virtue thereof the Plaintiff, Mildred Flanigan, is entitled to no part thereof.

DATED this 28th day of June, 1985.

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation

By /s/ Fred Ogolin
Vice President

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a United States corporation, and FRED OGOLIN,

Appellants,

v.

MILDRED FLANIGAN,

Appellee.

On Appeal From the Supreme Court of Montana

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This brief is submitted pursuant to Supreme Court Rule 16.5 by appellants Prudential Federal Savings & Loan Association (hereinafter "Prudential") and Fred Ogolin (unless otherwise clear from the context, Prudential Federal and Fred Ogolin will be referred to jointly as "Prudential Federal") in opposition to the motion of appellee Mildred Flanigan (hereinafter "Flanigan") to dismiss their appeal to this Court. Flanigan seeks such dismissal on the grounds that (1) the constitutional issues presented by Prudential Federal's jurisdictional statement were neither raised by Prudential Federal in the Montana Supreme Court nor considered by that court, and (2) the appeal is moot because Flanigan has received payment of the judgment. Neither of these arguments can withstand scrutiny. Prudential Federal's constitutional challenge was *both* asserted and considered below. Moreover, the law is clear that the payment of a money judgment does not render an appeal of that judgment moot, particularly when, as here, the judgment was paid involuntarily.

I. THE CONSTITUTIONAL ISSUES PRESENTED BY PRUDENTIAL FEDERAL'S JURISDICTIONAL STATEMENT WERE TIMELY RAISED BELOW.

Prudential Federal has set forth at length in its jurisdictional statement its position with respect to the timeliness issue and will not reiterate that position here, except to respond to four arguments made by Flanigan in her motion to dismiss.

First, Flanigan argues that a constitutional claim raised implicitly below cannot be the basis for an appeal to

this Court. In support of this argument, however, Flanigan offers only cases stating the long-accepted principle that constitutional issues must be raised below, none of which consider the question of whether and how such an issue may be *implicitly* raised. Flanigan makes no attempt whatever to distinguish, indeed, does not so much as refer to, the cases cited by Prudential Federal in its jurisdictional statement which specifically provide that a constitutional issue may be implicitly raised. *See Braniff Airways v. Nebraska State Board of Eq. & A.*, 347 U.S. 590 (1954); *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

Second, Flanigan argues that Prudential Federal did not implicitly raise a due process issue in its original brief to the Montana Supreme Court because it did not use "signal words, such as 'due process,' 'unfair,' 'fundamental fairness,' or similar language that would suggest a federal constitutional 'due process' issue . . . .' " (Flanigan's motion to dismiss, p. 8.) This contention is simply wrong. In its original brief to the Montana Supreme Court, Prudential Federal argued as follows:

> [S]ince PFS, at the time the plaintiff's employment was terminated, could have had no *notice* that its conduct could subsequently be regarded as wrongful and since no question of outrage was present, it is patent that the district court erred in submitting the question of punitive damages to the jury . . . . This Court has emphasized that the concepts of *elemental fairness* would prohibit an award of punitive damages against an employer in [a] wrongful termination case where the employer could not know that its conduct would be regarded, at a much later date, as wrongful.

(Appendix to Prudential Federal's jurisdictional statement, p. 37.) (Emphasis added.)

Prudential Federal's argument with respect to "elemental fairness" goes well beyond "suggesting" a due process issue. The principle of elemental fairness is at the very heart of due process, as is the principle of notice. Moreover, to argue that "elemental fairness" is not "similar language" to "fundamental fairness" is pedantry of the highest order. Even a cursory review of Prudential Federal's original brief to the Montana Supreme Court makes clear its implicit due process argument. (See pages 47 through 57 of Prudential Federal's appellate brief to the Montana Supreme Court, which appear in the appendix to Prudential Federal's jurisdictional statement, pp. 32-43.)

Third, Flanigan argues that the Montana Attorney General's not having received notice of Prudential Federal's constitutional challenge to the state punitive damages statute "is yet another reason why it could not, and would not, be considered by the Montana courts." (Flanigan's Motion to Dismiss, p. 9 n.3.) This argument ignores the fact that Prudential Federal's argument as to notice and elemental fairness was, in fact, considered by the Montana Supreme Court:

> Appellants argue that they had no notice that their conduct would be subject to punitive damages. However, the punitive damage statute, § 27-1-221, MCA, was in effect at the time appellants committed the subject acts. Appellants were fully apprised that malicious or oppressive conduct on their part could lead to the imposition of punitive damages.

(Appendix to Prudential Federal's jurisdictional statement, p. 18.)

It is not enough for Flanigan to argue that the Montana Supreme Court *might have* rested its decision on a

particular independent state ground. She must show that the Montana Supreme Court did, in fact, do so. As this Court has made clear, that the state court "might have, but did not, invoke state law does not foreclose jurisdiction here." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

The record is clear that the Montana Supreme Court did not rest its decision on the ground of failure of notice to the Attorney General. Indeed, this is the first time Flanigan has ever raised the issue.

Moreover, the state of Montana has been in no way prejudiced, the Montana Supreme Court having sustained the constitutionality of the punitive damages statute. Further, despite having been served with Prudential Federal's writ for an injunction and jurisdictional statement to this Court, the Montana Attorney General has made no response, choosing instead to rely upon the efforts of Flanigan's counsel to argue the constitutionality of the statute.

Fourth, Flanigan asserts that Prudential Federal did not raise its Eighth Amendment claim in connection with its petition for rehearing before the Montana Supreme Court. A reading of the petition for rehearing demonstrates this assertion to be in error. Prudential Federal asserts as follows in that petition:

> "[t]his Petition for a rehearing is, to a significant extent, based upon the recent directive that has been given by the United States Supreme Court to state courts that punitive damage awards must be analyzed in terms of the Federal Constitutional rights of the Defendants: . . . ."

(Appendix to Prudential Federal's jurisdictional statement, p. 45.) Prudential Federal then proceeds to quote a

portion of this Court's decision in *Aetna Life Insurance Company v. Lavoie,* — U.S. —, 106 S.Ct. 1580 (1986) that makes specific reference to Excessive Fines Clause analysis.

Regardless, even if it is assumed that Prudential Federal did not adequately raise the Excessive Fines Clause question in its petition for rehearing, because this Court has jurisdiction of cases, not questions, it has jurisdiction over the Excessive Fines issue on the basis of Prudential Federal's implicit invocation of the Due Process Clause in its original brief to the Montana Supreme Court or its explicit invocation of the Due Process and Contract Clauses in its petition for rehearing. (*See* Prudential Federal's jurisdictional statement, pp. 12-13.)

II. THE FACT THAT FLANIGAN HAS RECEIVED THE JUDGMENT AMOUNT DOES NOT MOOT THIS APPEAL.

Flanigan further argues that Prudential Federal voluntarily satisfied the judgment against it, thereby mooting this appeal. A brief review of the facts surrounding Flanigan's receipt of the judgment amount demonstrates this assertion to be wholly unsupported.

Following judgment in this action, the district court ordered Prudential Federal to post a supersedeas bond in the amount of $1,645,000. In lieu of posting such a bond, Prudential Federal placed $2,000,000 in U.S. Treasury Notes in an escrow account with the First Bank Butte. (A copy of the escrow agreement appears in the appendix to Flanigan's motion to dismiss, pp. 2-8.) The escrow agreement provided as follows:

> In the event the judgment . . . is affirmed upon appeal, Flanigan shall have the right to immediately

> demand and receive after remittitur the delivery of the securities by First Bank up to the amount of final judgment. . . .

(Appendix to Flanigan's motion to dismiss, p. 5.) On the basis of the escrow agreement, the district court stayed execution upon the judgment pending final decision on appeal. (A copy of the order staying execution is included in the appendix to Flanigan's motion to dismiss, pp. 9-11.)

On June 5, 1986, the Montana Supreme Court affirmed the judgment. It denied Prudential Federal's petition for rehearing on Friday, July 11, 1986. Plaintiff instructed the First Bank Butte to sell the U.S. Treasury Notes at 8:30 a.m. on the next Monday, July 14, 1986, and pursuant to that instruction, a check was issued in the amount of $1,676,581.51 to Flanigan.

On July 29, 1986, Prudential Federal gave Flanigan notice of its intent to appeal the decision of the Montana Supreme Court to the United States Supreme Court, and of its intent to seek an injunction requiring that Flanigan place the judgment in an escrow account pending review by the United States Supreme Court. Prudential Federal subsequently submitted a petition to the Montana Supreme Court to issue such an injunction, which petition was denied. Prudential Federal's petition for a writ of injunction submitted to Justice Rehnquist was also denied.

Flanigan argues that Prudential Federal is barred from appealing to this Court because the escrow agent paid Flanigan the judgment amount. The argument is wholly without merit. First, the judgment was not, as Flanigan asserts, paid voluntarily. Second, even if it were

assumed that Prudential Federal paid the judgment voluntarily, such payment would not bar appeal.

"It is a settled rule in the federal courts that the payment of a judgment does not bar an appeal therefrom where repayment may be enforced." *Leader Clothing Co. v. Fidelity & Casualty Co. of N.Y.*, 227 F.2d 574, 575 (10th Cir. 1955). So, too, is this the rule under Montana state law: "A defeated party's compliance with the judgment renders his appeal moot only where the compliance makes the granting of effective relief by the appellate court impossible." *Montana Nat. Bank of Roundup v. State, Dept. of Rev.*, 539 P.2d 722, 725 (Mont. 1975).

The Montana Supreme Court emphasized in the case of *State v. Rafn*, 304 P.2d 918 (Mont. 1957) that even a voluntary payment of a judgment does not necessarily bar an appeal. The court recognized this to be the law,

> notwithstanding a contrary dictum in *In re Black's Estate*, 32 Mont. 51, 79 P. 554, to the general effect that when a judgment has been paid it has passed beyond review, the satisfaction of it being the end of the proceeding. This is not always true in every case even of a judgment for money damages when payment is voluntarily made and generally speaking is clearly an incorrect statement of the law when payment or performance otherwise is involuntary.

Id. at 919-20.

In support of its holding, the *Rafn* court cited the case of *Webb v. Crane Co.*, 80 P.2d 698, 708 (Ariz. 1938), which sheds further light upon the voluntariness question:

> [T]here are cases deciding that one paying a judgment against him precludes all appeal therefrom. The better view, we think, is that though execution has not

> issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal, unless payment be by way of compromise and settlement or under an agreement not to appeal or under circumstances leaving only a moot question for determination.

(Quoting Freeman on Judgments, Vol. 2, Fifth Edition, p. 2419 ¶ 1165.)

Thus, the voluntariness question turns on whether the payment was made under an agreement not to appeal. There is no basis whatever for the argument that Prudential Federal waived its right to appeal in connection with payment to Flanigan of the judgment amount. Neither the escrow agreement nor the assignment make any mention of any such waiver, and these documents constituted the "full agreement between the parties." (Appendix to Flanigan's motion to dismiss, p. 7.)

It is well established under both Montana and federal law that the right of appeal can be waived only if the language of the waiver is extremely clear and unambiguous. As the Montana Supreme Court held in finding that a stipulation did "not amount to a clear showing the parties intended to preclude any right of appeal":

> Such an agreement should be very clear on its terms, and leave no doubt of the intention of the party to cut himself off from the right of appeal.

Groves v. Groves, 567 P.2d 459, 461 (Mont. 1977). The same rule has been long established as a matter of federal law. *See, e.g., Kane v. Roxy Theatres Corporation*, 63 F.2d 754, 756 (2nd Cir. 1933).

Moreover, in addition to being clear and unambiguous, the waiver of a right must be knowing and intentional. The United States Supreme Court has enunciated the classic definition of waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Fay v. Noia*, 372 U.S. 391, 439 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

In the face of this rigorous standard, Flanigan can point only to two documents serving in lieu of a supersedas bond, which do not so much as mention waiver of appeal, as constituting waiver. The simple fact is that if the parties had intended to waive appeal to this Court, they could have done so within the escrow agreement in one sentence. The escrow agreement and assignment were intended merely to protect Flanigan's judgment pending appeal to the Montana Supreme Court, not to waive Prudential Federal's right of appeal to this Court.

———o———

CONCLUSION

Prudential Federal implicitly challenged the constitutionality of the Montana punitive damages statute in its original brief to the Montana Supreme Court and that challenge was considered by the Montana Supreme Court. Moreover, that challenge was made explicit in Prudential Federal's petition for rehearing to that court. Finally, Flanigan's contention that Prudential Federal voluntarily paid the judgment amount and waived its right to appeal is wholly without support. Accordingly, Flanigan's motion to dismiss should be denied.

DATED this 17 day of November, 1986.

Respectfully submitted,

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